UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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IVAN ANTONYUK; COREY JOHNSON, ALFRED TERRILLE; JOSEPH MANN; LESLIE LEMAN; and LAWRENCE SLOANE,

Plaintiffs,

vs. 1:22-CV-986

KATHLEEN HOCHUL, in her Official Capacity as Governor of the State of NY, et al.,

Defendants.
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Transcript of a Motion Hearing held on October 25, 2022, at the James Hanley Federal Building, 100 South Clinton Street, Syracuse, New York, the HONORABLE GLENN T. SUDDABY, United States District Judge, Presiding.

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(Open Court, 10:06 a.m.)

THE CLERK: Case is Ivan Antonyuk, et al. versus Kathleen Hochul, et al., 22-CV-986. Counsel, please note your appearances for the record.

MR. STAMBOULIEH: Stephen Stamboulieh for the plaintiffs.

THE COURT: Good morning. Welcome back.

MR. THOMPSON: Thank you, your Honor, James Thompson for the state defendants, Governor Hochul, Judge Doran, and Acting Superintendent Nigrelli.

MS. TWINEM: Alexandria Twinem also for the state defendants.

THE COURT: We haven't seen you before. Welcome.

MR. LONG: Good morning, your Honor, Todd Long for defendant Chief Cecile. Also appearing with me are Danielle Smith, Susan Katzoff, Corporation Counsel, and Darienn Balin.

THE COURT: Okay.

MR. HEISLER: Morning, your Honor, John Heisler for defendants Eugene Conway and William Fitzpatrick.

THE COURT: Mr. Heisler, you're more than welcome to come to the table. Mr. -- Buster, come on up.

MR. MELVIN: Edward Melvin, defendants Oakes and Hilton.

THE COURT: Okay. Please, please sit at counsel table, make yourself comfortable. We'll proceed in the

manner that we have in the past, letting plaintiffs present their arguments. I would emphasize that you spend the majority of the argument on the areas that you think are most critical to your case. Certainly I think the court has signaled a couple times that plaintiffs have some standing issues that I'd like you to address, and certainly the state has taken the position that this is a facial challenge and the majority of your argument presumes that that's the case. I'd like to hear about why you think it's that way and, you know, maybe address some of the issues if it's not a facial challenge, what does that do to your argument in certain areas of where the statute's getting challenged, okay? But please, feel free to take your time, I'm not going to curtail your time, I want you to have the time that you feel you need to make the points you want to make before this court issues a decision on this matter. Okay? And I would say to the city, county of Oswego, county of Onondaga, if there's anything that -- further, you submitted papers that state your position, but certainly I want to hear from you should you feel there are important matters that need to be emphasized, okay?

Plaintiffs' counsel, when you're ready.

MR. STAMBOULIEH: Judge, is it all right if I move this?

THE COURT: You sure can. It's designed to do

that.

MR. STAMBOULIEH: Just feels weird looking at it from an angle.

THE COURT: Looking at everybody sideways. All right.

MR. STAMBOULIEH: Perfect. Morning, your Honor, may it please the court.

THE COURT: Good morning.

MR. STAMBOULIEH: Stephen Stamboulieh for the plaintiffs, I got it right this time. I wanted to just give the court a brief story. I'm going to address all of the points that your Honor has raised but just a brief story since I've been in Syracuse. Like a normal day yesterday for me, if I had an apartment in New York, I would have committed six felonies. I went to the hotel which was not posted, also serves alcohol. I went out, I went to Dunkin Donuts and had a coffee, it wasn't posted guns allowed, that's a felony. Then I went to get gas, the store wasn't posted, that's a felony. I did visit a gun store and that had a guns allowed sign so that wasn't a felony, but since I'm not a resident, I'm not even allowed to touch a handgun and so they wouldn't even let me touch one so it was kind of a wasted trip. But as a nonresident, I have no Second Amendment rights in this state but the plaintiffs here do. And so this is kind of what I wanted to make it a little real for the court saying

all of these places that normal, everyday permitted people like Mr. Antonyuk, like Mr. Leman, Mr. Mann, they do all of these just normal everyday activities and now they're all felons if they continue to do it.

I wanted to point out some things with the defendants' brief that -- I know we filed a 50-page reply, your Honor, but there's still not enough room to address all of the things. They rely very heavily on then-Judge Amy Coney Barrett's dissent in *Kanter* and it talks about how history's --

THE CLERK: Can you tell whoever's on there they should be calling in the audio, not through the overhead? I don't know who it is, Ryan's trying to disable it.

THE COURT: Somebody's --

THE CLERK: Yeah, there's 19 people listening in, so --

THE COURT: Okay. The individuals that may be on and listening through technology need to mute yourself, any speakers that you may have, or else we'll cut the whole system. I'm not going to have this proceeding interrupted by people speaking remotely through computers or otherwise. So please, if you're attempting to attend this proceeding through technology at a different location, make sure that any ability to communicate is muted so that there is no further interruption. Thank you. Sorry about that.

MR. STAMBOULIEH: Thank you, Judge, thank you.

THE COURT: All right, go ahead.

MR. STAMBOULIEH: As I was saying, New York has relied extensively on then-Judge Amy Coney Barrett's dissent in *Kanter v. Barr* where she states, "History is consistent with common sense: It demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." And here, New York is not preventing dangerous people from getting guns. In fact the plaintiffs here are the exact opposite of the dangerous people that now-Justice Barrett was discussing, and all but Sloane, who can't even apply for a permit, has passed all the barriers New York enacted to prevent them from carrying firearms in public. They even met the standard that the Supreme Court now says is unconstitutional. And we shouldn't even call it the Concealed Carry Improvement Act, it should renamed the Concealed Carry Impairment Act because that's the effect that it has on all of the citizens that are in New York and are permitted of course. It only targets lawful permitted firearm carriers and makes it a felony, as we've already discussed, to carry in almost all of the places that law-abiding citizens could carry prior to September 1st. You might ask why I say it only targets permitted carriers of firearms, is because the default position in New York is that all places are off limits, even your home, unless you have a

permit. So you can't even carry, you can't even have a handgun in your home unless you have a permit. You can't carry outside unless you have a permit.

So that was the default position or that is the default position, and when you get a permit, even now, the CCIA prevents normal people with permits from carrying, so the CCIA was not this great crime control package that the Governor claims it is. It's only targeting the concealed carry permit holders. There's no evidence that concealed carry permit holders are the ones that are causing the crime, and that's fine, because *Bruen* doesn't require that we use evidence-based -- that we have evidence like that to prove that this restriction is lawful, unless New York claims that there's this new societal problem. But as *Bruen* already addressed, gun violence is not some new societal problem, we've always had gun violence. What we haven't always had, though, Judge, are permits to carry, and they started around the 1880s, 1890s, and it's not these people that are committing the crimes.

So while New York has this overall public interest, right, they don't have an interest in preventing law-abiding citizens from exercising their Second Amendment right to public carry as was held in *Bruen*.

This, the opposition that the state filed, even though it was 95 pages in length, over 550 exhibits, is very

light on 1791 law, and it's even light on 1868 law. A lot of the statutes they cite to come after 1868, when the 14th Amendment was ratified. The Supreme Court identified two periods of time to look at these statutes. I suggest that the period that we really should look at and be focused on is 1791 because, as Justice Thomas said, the right is pegged with the understanding that the framers had when they enacted the Second Amendment and if the Second Amendment applies to the federal government under a 1791 standard, it can't then apply to the states under an 1868 standard because it applies to both the federal governments and the state governments with the same understanding, and that I believe was from *Bruen*.

So if we look at the 1791 laws, there's almost no analogues that support any of this. We can look at some of the 1868 laws, we might be able to pull out, well, you know, is a banquet hall where a church would have someone eating food in, you know, their -- I'm losing my thought here -- their cafeteria, right, but overall the church they've made off limits and there's no analogue for a church being off limits. We've pointed to two statutes, one from 1740 which is admittedly before the Second Amendment was ratified, from a state and another from 1770 from a state that allowed -- I'm sorry, didn't allow, required people going to church to carry arms.

As this court is aware, a few days ago, a Western District Judge in *Hardaway v. Nigrelli* enjoined the church provision. I had meant to look to see if that had been appealed yesterday, I did not but as of Sunday I do not believe that it has been appealed yet.

And we can also look at New York's prior scheme where, for hundreds of years, in fact all of New York's history, the majority of these places have never been off limits. Had there been an argument even going back to 1911 that the Sullivan Law was meant to, or it stopped people from carrying in churches and stopped people from carrying in restaurants with alcohol, maybe we could analogize that in to say that this has been a problem that New York is trying to deal with, but it's just not and as we've said over and over and over and I'm trying not to repeat myself, this law stops law-abiding citizens from carrying firearms.

And then the second thing, or fourth or whichever number I'm on, only four defendants filed -- I'm sorry, four defendants filed nonoppositions to plaintiffs' motion for a preliminary injunction and two just didn't respond. Only -- out of the ten defendants, only four opposed, defendant Cecile and then of course the state defendants. And we know a preliminary injunction is not afforded as a matter of right but the fact that six of the defendants are not opposing the relief or just failed to respond, I think it speaks volumes.

In this court's TRO order, footnote 15, the Judge, you cited to the *Ezell* case. It talks about the statute, it says two statutes fall far short of establishing that the regulated activity is outside the Second Amendment. And I know in this court's opinion, the court was looking at whether or not there were three or more analogues. I would submit that three is not enough, your Honor. Three wouldn't show the tradition, it wouldn't show that it was a well-established representative analogue. And I can break this down.

For instance, in 1791 we had 14 states. Three similar analogues from 1791 addressing the same issue would show roughly 21 percent of the states had this particular analogue. But 21 is not well established and it certainly is not representative. And you might ask where am I getting this language from. It's exactly from *Bruen* at 2133. It says, *Bruen* requires that the government identify a well-established and representative historical analogue, not a historical twin. But the analogue has to be two things because it's joined by the "and", it must be well established and it must be representative. So 21 percent would be neither of those.

And in 1870 when we see the majority of the statutes that the state cites to, we had 37 states, so that means we have 8 percent of the states agreeing on whatever

the analogue is at that time, whether it's, you know, not carrying in church or something like that.

If we wait a few more years until 1890, then it goes down, it's 7 percent but it's still, you know, another drop, it's not a well represented -- we wouldn't say today someone wouldn't become, like if the Governor got 7 percent of the vote, we wouldn't say that's a well-established, well-representative vote for the Governor, so I don't think we can do the same thing for this. And I don't know what the right answer is, Judge, but it seems to me like it would have to be, as the court said, well-established, representative.

THE COURT: So let me ask you a question with regard to -- as we've indicated and I've heard from both sides, you're talking about prior statutes. The analysis the court has to do, do you have a recommendation as to how those statutes should be treated and how that analysis should take place?

MR. STAMBOULIEH: Yes, sir, I do. So if we look to *Bruen*, they, of course they split, and *Heller* did the same thing, they looked at the colonial time and then they looked at the antebellum time and they looked at ratification and they kind of separated all the statutes out and then they decided how they were going to weigh each statute. Some of these statutes from -- there's a lot of dates here, I'm sorry. I think it's like 1870 were from courts like *English*

v. State and *Hill v. State* where they -- the court said that you don't have a Second Amendment individual right, and *Bruen* actually talks about *English v. State* and discounts *English v. State* and so the cases that flow from that, we cited to this in our reply brief when we talk about *Young v. Hawaii* and the *Young* panel just went through all of these different cases. So to answer the court's question, I think the statutes that have the most weight are ratification, what the founders would have actually intended. And we can look to 1868 for some support, right, so if we have 37 states in 1868, and 30 of them, and I'm not suggesting that 30 is the number, but 30 would certainly show that it's a well-established and representative agreement from all the people that would have understood in 1868 when the 14th was ratified what the Second Amendment meant. And that would be my answer for that, Judge.

THE COURT: Okay. And how about statutes from territories, ordinances from cities?

MR. STAMBOULIEH: So --

THE COURT: How should the court treat them in this analysis?

MR. STAMBOULIEH: So *Bruen* discounted the statutes from the territories, and they did it just wholesale, these aren't worth anything, but they looked at the population percentage from three of the ordinances I believe and said

that this has like .2 of 1 percent of the total population in the United States in 1832 and they went back and they looked at the census data, which I've done here but didn't have enough room to do in my brief, and then they looked and said 1 percent isn't well representative and well established. And they kind of treated them as to how, how much of the population they affected and looked at, you know, how it affected everyone.

And in the same footnote, 15, in the TRO order, your Honor quoted to the *Illinois Association of Firearm Retailers*, and it supports the reading that three is not enough. In fact it specifically says, the three statutes Chicago proffered from three states, 1837, 1879, and 1901, the isolated statutes were enacted 50 to 110 years after 1791, which is the critical year for determining the amendment's historical meaning. So I think *Bruen* says 1791, maybe we look a little bit further if there's well-represented, well-established statutes coming after that that would show a coalescence around a tradition, but I would submit that three is not that tradition, your Honor.

I'm going to just add a couple of points and then I will get into the court's questions. The four character references, footnote 22 of your Honor's opinion, relies on three analogues. I did the math, it covers about 1.9 percent of the population at that time, and it starts off with an

1832 Delaware statute. I had -- in 1832 Delaware had about 77,000 people and this statute, and the court even recognized this, this had only to do with freed Blacks and freed mulattos and they had to have five people say that they were, you know, they had good moral character. It didn't apply to anybody else and it only applied to them. But the most important thing was it was repealed in 1843 so I don't think we use it at all. And then the freed Blacks and the freed mulattos were completely banned in 1863 from having guns at all. Okay, not talking about the white folk at the time, we're just talking about the freed slaves and the freed mulattos.

Then we're left with two ordinances, one from 1871, Jersey City, from that census had over 100,000, it didn't say how much but I'm guessing, I'm just estimating over 100,000 and in 1881 New York City which the census said had over a million. That's 1.8 percent of the population, excluding Delaware. And I don't think that we can rely on those because, number one, they come 80 and 90 years after the Second Amendment, and again, they're just ordinances covering a tiny percentage of the population.

And *Bruen* talks about this, your Honor, on -- at 2154 to 55 where it, it's -- says, "We've already explained that we will not stake our interpretation of the Second Amendment upon a law in effect in a single state or a single

city that contradicts the overwhelming weight of the other evidence regarding the right to keep and bear arms in public for self-defense." And it says, "Similarly, we will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1 percent of the population and contradicts the overwhelming weight of other more contemporaneous historical evidence."

So what is the other more contemporaneous historical evidence? It's that none of the other states had these types of laws, and the vast majority of them had none of these laws that we're now looking at. So when we can reach back in history and say, I've identified one statute from 1791 that is close enough that would ban this one thing, the overwhelming evidence is that the other states didn't do it that way.

As to good moral character, the court said that it could be rendered constitutional only if it were considered as containing the following changes, and then the court said how it could be constitutional. I would submit, your Honor, that having to have the court say this is the only way it could be constitutional means that since it's not written that way and instead of being, "No license shall be issued," the court rewrote it to, "A license shall be issued," means that the statute is just unconstitutional. If we look to

Virginia v. American Booksellers Association, it's a Supreme Court case, it says holding of the statute must be readily susceptible to a narrowing construction that would make it constitutional as the court will not rewrite a state law to conform it to constitutional requirements. Since the court cannot rewrite the law, the only solution is to strike it.

We've talked about the churches. I would submit, your Honor, following Judge Sinatra's opinion, the dearth of statutes that are contemporaneous with 1791, I -- that law falls.

And then it brings me to training. California does have a statute where they say it can be up to 24 hours. I have yet to be able to find a county that requires 24 hours. I'm not saying it doesn't exist. I can't find it. All of the places that I found, the big counties, San Diego, Los Angeles, require eight hours. That is half as much of what New York says. And while it does say they can require up to 24 hours, most of the requirements are eight hours. And those classes are 250 to 295, these are just quick samplings. Illinois does require 16 hours, it got concealed carry in 2013 as a result of *Moore v. Madigan*. It's a, you know, very new statute. They have a little bit different way to get those 16 hours, is they can be in a combination of classes and the statute actually says it, so I don't have to sign up for one 16-hour class and devote blocks of time on a weekend

or however it is, I can split them up, might make it easier. That course is only $225.

Alaska, 12 hours, kind of shocked me --

THE COURT: Are you saying 225 hours or dollars?

MR. STAMBOULIEH: Sorry, dollars.

THE COURT: That's what I thought, okay.

MR. STAMBOULIEH: Alaska surprised me with 12 hours because it's Alaska, but you don't even need a permit to carry so if you want a permit to carry, you got to get the training but you don't even have to go, so I don't even think we have to look at that. But in any event, I looked at it, it's $195 for the class out there.

And then New Mexico requires 15 hours but their classes are $200.

So the classes that we found in this area, and when we get into discovery and start deposing some people, we're going to get all of these trainers to come in and give the court, here's how much our classes cost rather than you just relying on what the attorney says which I, you know, it is what it is for now, but these classes are so expensive out here, that plaintiff Sloane who doesn't have his permit yet and hasn't been able to apply but does have an appointment, is going to spend 800 to $1,000 just to get his permit. And we have that one case, I can't remember, I think it's a Second Circuit case where it said that $340 licensing fee

isn't unconstitutional. It's only $340, your Honor. Okay. But now we have the licensing fee plus the almost 800, 700, whatever it is for the training costs so now we've tripled what the $340 licensing fee is that was held constitutional. And I think footnote 9 of *Bruen* supports -- or does not support a licensing scheme that can cost so much.

Turning to your Honor's questions --

THE COURT: If I could, I want to throw another one at you, and you address it the way you want to, but the state has indicated that their language of the statute tracks the language of other shall-issue states' statutes and they provide different states they say their statute tracks. I wonder if you want to address that.

MR. STAMBOULIEH: I believe they're talking about the Connecticut, if it's the Connecticut statute that talks about good moral -- good moral character, is that your Honor's question? If I recall correctly from *Bruen*'s footnote, I'm not sure what footnote it is, maybe it's 4, where they talk about how the Connecticut -- or is your Honor's question about the training associated with that?

THE COURT: No, no, generally the statutes that they're referring to, good moral conduct, other aspects of the New York State statute that they say tracks what's going on in other shall-issue states.

MR. STAMBOULIEH: Right. Wow, that's a big

question, I'm going to do my best to answer it. So, I don't think it -- it could track it in some ways, but I think overall it doesn't track it. In the majority of the states I don't have to go get a permit to have a gun in my home. You have some states like New Jersey that have a permit to acquire or permit to purchase and you have some states like Hawaii where you have to have a permit to purchase, it takes 14 days generally to get, and New Jersey I think is quicker than that.

Their language here that they've pulled from other statutes is still super discretionary. It's not like the Connecticut statute that was identified in the *Bruen* decision where it said, this kind of operates like shall-issue. Here, they've left so much open to the licensing official to request anything, Judge. And in our first *Antonyuk I* case, I kind of made a passing comment about, you know, fingernail or asking for urinalysis, and I don't know if Nassau County saw that brief and said, hey, that's a great idea, but Nassau County is requiring urinalysis, or a urine sample so they can see if, in the application information you said you're not taking any illegal drugs so we want to check your urine now. And I think that's the kind of stuff that this law invites, it's open-ended discretion. They can ask for whatever they want, and I don't know of another permitting statute that allows such open-ended discretion, number one for what's

required. New York could put stuff in their bill that's objective, to not leave the licensing officer with discretion. If it was shall-issue, then they would be entitled to, right, according to *Bruen*, maybe, and especially according to the concurrence from Kavanaugh that they keep citing to, where it talks about you could be subject to a background check, training, and I think a mental health records check. Okay, great, that's really easy to do, Judge. In fact the federal government has a system calls NICS that I'm sure the court is familiar with, where I can -- if we were in any other state but New York, I could walk into a gun store, they could run my background immediately and could sell me a firearm. Checks mental health records, checks federal crimes, state crimes, and then the only thing that's left is training. If New York -- we're not saying it's constitutional but if it was a four-hour course that's been offered forever here in New York, what was the problem with that? They haven't said that there's some new societal problem that the people that are carrying guns, the law-abiding ones that are carrying guns are, you know, needing additional training or anything like that. They just passed it to make it more difficult for normal people to be able to carry now that you don't need proper cause. So I don't think it's fair to say that the licensing statutes that they've written track anything, like any -- any current law

other than them saying that it tracks it.

THE COURT: Okay, then how would you apply -- reply to the state's contention that this is not open-ended discretion, that it does not give these public officials an opportunity to get into these areas, and if there is, there can be an as-applied challenge to that type of open-ended discretion?

MR. STAMBOULIEH: Well, I think, I think the problem with that argument is that their statute invites even the thought that there is this issue of open-ended discretion, because they don't limit -- I mean, I know it says on its face that it's limited to what's reasonable and necessary to complete the application, such other information, but that can be anything. Because they want to make sure, what, that you have good moral character so they can go down the rabbit hole. They say that it doesn't require social media passwords and on its face it doesn't say turn over your social media passwords, but on its face it says that the licensing officer has to review your social media, so how are they going to review it if it's private or if it's set to, you know, friends only? And this is the kind of thing that I don't think you have to wait for an as-applied challenge when you have someone in front of you saying, number one, it's futile for me to apply because I can't apply until next year sometime, and by law, by law,

they're not allowed to grant an incomplete application. And I know there was some pushback from the state on that the last time about they're not going to speculate as to how Judge Doran would rule. I suggest that we ask Judge Doran. There's no way under state law that he could grant that permit without having done all of the stuff. I guess he could break the law, but it doesn't seem like a state judge would do that, but that's something that we could absolutely ask him in discovery. Did I answer your question, Judge?

THE COURT: Yes, I'm sorry to interrupt, go ahead.

MR. STAMBOULIEH: No, that's fine, thank you. The judge entered a text order on October 19th identifying some areas that we didn't challenge. It's no secret we did not challenge Times Square. When I brought it up in the first hearing, it was that they've sent the letter to the businesses and to, I think it was also maybe to residences that lived around Times Square in Times Square saying, hey, look, your premise license is no longer good here because Time Square is now a sensitive place so turn your guns in. And I think I actually said that Times Square is not an issue. So there's a lot of these that we're not challenging.

Where we are challenging, we've been very explicit in the declarations. For all of the plaintiffs, we listed out by the sections. And I made a spreadsheet for myself where we talk about, you know, locations providing health

care -- let me just match this up to yours, your Honor. Your Honor says, carefully considering whether plaintiffs have sufficiently shown a concrete intention to carry concealed in these paragraphs: 2B, health. And if we look at 2B, it talks about health, behavioral health and chemical dependence. So it seems that health would be subsumed or would include behavioral health and chemical dependence. It seems like all of that's kind of the same thing to me. And of course, you know, plaintiff Mann, the pastor, is the one that goes out and visits with people and brings people to his church and provides his ministry and provides these services, addiction recovery services through RU Recovery so I would submit to the court that health and behavioral health are kind of one and the same but to the extent your Honor disagrees, you know, that's up to the court.

We talk, make sure I'm not ... the Judge identified libraries, and we have not, we have not sought libraries, Judge.

2E, we have not sought programs.

2F, we have not sought summer camps.

G through J, your Honor --

THE COURT: When you say summer camps, specifically you're saying youth summer camps?

MR. STAMBOULIEH: One of the problems with the way this law is written is that you can classify -- you know,

like what's the summer camp? I don't know what a summer camp is. So you know, plaintiff Mann, the pastor, right, has kids come over the summer and doing whatever he wants to do but, you know, is that a summer camp? I don't know if it's a summer camp. Maybe we get into that in discovery and I can, and after I figure out what this law actually says for summer camps, I can tell your Honor straight faced, yes, we're challenging summer camps because they think it applies to Pastor Mann's youth group in the summer.

THE COURT: Okay.

MR. STAMBOULIEH: G through J, where it talks about the location of programs, funded, licensed and regulated by the office and then it lists various offices, we're not challenging that.

The shelters one on 2K -- make sure I'm looking at this correctly. Your Honor has questioned or has at least raised a suspicion of standing as to shelters. They listed seven different, seven different programs within this one term. We have homeless shelters, runaway homeless youth shelters, family shelters, shelters for adults, domestic violence shelters. The two other ones are emergency shelters and residential programs for victims of domestic violence. So Pastor Mann does not run an emergency shelter and does not run a residential program for victims of domestic violence but he absolutely does, you know, carry in a number of places

like homeless shelters when he goes and ministers to people. The family shelters, the shelters for adults, I think those are all fairly brought in under plaintiff Mann's intent to continue to offer the services that he's been offering as part of his addiction ministry, his ministry to other people as well, so I would submit that we have done that.

And then L, where it talks about the Department of Health residential setting, we're not challenging that.

I would suggest, your Honor didn't have 2M where it talks about educational institutions, Mann has, and this is another one of the problems with these laws, it's -- it lists a lot of stuff that seem very specific but when you get down to nonpublic schools, as plaintiff Mann has said, he has -- he allows his church to be used as a home school co-op. If that qualifies as a nonpublic school, it's something that we briefed, then this law is unconstitutional because he should be able to, number one, carry in his church which he can't anyway, but the state shouldn't have a right to come into a nonpublic school, if his is considered a school, and tell whoever runs that school that they can't -- that they can't carry there. It's their kids, they should be able to take care of them how they want to.

And in public transportation, your Honor in the text order wrote everywhere but buses and I would like to remind the court, one of the big problems is, plaintiff

Terrille cannot check a firearm into a plane to travel consistent with TSA regulation, that's obviously airports that would be included in that. Nowhere in the plaintiffs' -- I'm sorry, keep getting them confused, right -- nowhere in the defendants' reply do they say, you can check a firearm in an airport, it's okay, nowhere do they say that. And the reason is because you can't because on the face of the CCIA, it excludes airports, and instead of saying you can do it consistent with federal law, they say airports are sensitive places, so they just keep going back to the sensitive places. It's like, well, maybe the airport where you go through security and we're talking about the sterile area of the airport, that's sensitive, it's full of police, I go through metal detectors, right? Airplanes, we're not asking to carry on an airplane, we're asking for Mr. Terrille to have his firearm checked with the baggage under the plane in accordance with all TSA regulations. But that, that consumes a lot of the statute. A place, conveyance, or vehicle used for public transportation, maybe they don't mean it to include airplanes but the gun's going to be on the airplane, right?

As Pastor Mann talked about his buses, he uses it to transport the public sometimes, that's public transportation, that's buses. Pastor -- we already discussed airport.

Then we could bring in the facility used for the transport of passengers, so that's obviously an airport even though they also say airport in the statute. And then they say marine or aviation transportation, so they try to be very specific and then they're so specific and then they keep listing out other things so if we say, well, you can check a firearm to the baggage, but I can't bring it into the airport and I also can't bring it into the facility that's used for the transport of passengers and it also would be considered aviation transportation and it would also be considered a place, a conveyance for public transportation, so it's like all of these little things in the statute go with just Mr. Terrille wanting to check his firearm into his bag.

And Judge, to put the court at ease, we have not asked the court to grant drunk carry or stoned carry. We're not asking to go smoke pot and carry guns and we're not asking to go get drunk and carry guns. In fact, we don't even mention, I think except where we quote the statute about wanting to go into a place that dispenses cannabis, which is illegal under federal law still, but that's for a different time.

We do talk in 2P about the -- it says everywhere except theaters, but Pastor Mann talks about performance venues, concerts. Terrille wants to do the gun show, that would consider -- that would be an exhibit, I would assume,

again, depending on what the state says their statute says or what the court finds their statute says. The conference center would be the exhibit hall that he wants to go to and that also includes a banquet hall as well. So all of the statute -- all of the various places in the affidavits if the court were to go look at them again and can match up Section S or whatever it is, would -- should match up with what this is saying.

We haven't -- we haven't asked for stadiums, race tracks, museum, amusement parks, the gaming facilities, but a lot of these could also be the other ones because a gaming facility might also have a banquet hall, a gaming facility might also have a conference center. Where I come from, we have a lot of casinos, I would assume that would be a gaming facility but also a video lottery terminal which I would just assume that, but it also has conference centers because we have conferences down there, and it has banquet halls and it was used to do exhibits, and it was the Hard Rock Casino so of course they had concerts there, so I mean, there's all these different places.

Times Square, we're not challenging Times Square, Judge. You know, the only way that -- I'll just go ahead and say it. So New York has finally codified in one place all the places that licensed gun owners can't carry and it's in 265.01-e. Since now, there's never been one place that

someone would be able to go to look, where are all the places that I can't carry. I actually had to have another local attorney find all of the different places because they're just spread throughout this statute and this statute, this regulation, this environmental whatever. There's not a good place to look. But here they put it in a really good place, 265.01-e. So if the court finds that even though there is a severability clause, the way to get to Times Square is we just strike all of 265.01-e because it's all in the same place. And there's a Second Circuit case, the name escapes me at the moment, that talks about severability, that if the statute cannot be excised, like you can't take out certain words like if it was just we want to carry in buses, we could just strike through buses and it won't change the meaning of the rest of the statute maybe. The Second Circuit has said, well, there's two instances where that might not happen or might not be possible. If changing the statute or excising words from the statute fundamentally changes what that statute means and it's not what the legislature would have enacted, then the whole thing falls. And the severability clause is not dispositive to the severability analysis.

And so to the extent that if the judge were inclined to grant the preliminary injunction and found that in the various places that the plaintiffs have set forth the concrete intent to carry and violate the law, then it would

be up to the judge to determine whether or not it can be excised or whether it can be severed, all of the 265.01.

Does the court have any other questions?

THE COURT: I'm good.

MR. STAMBOULIEH: Thank you, your Honor.

THE COURT: Thank you. So Mr. Thompson, I see you getting up so I assume we're going to go state, city, and the counties can weigh in if you'd like.

MR. THOMPSON: Yes, if that works for your Honor.

THE COURT: That's fine.

MR. THOMPSON: Thank you, your Honor, James Thompson for the state defendants.

Your Honor, as we've said before, as Justice Barrett said, "History is consistent with common sense: It demonstrates that legislatures have the power to prohibit dangerous people from having guns." It also demonstrates that reasonable licensing procedures are lawful, that there are places of critical importance where guns do not belong, and that there is nothing unconstitutional about giving property owners the right to make an informed decision about whether others can bring guns onto their land or into their homes.

The *Bruen* test is all about history, and the plaintiffs spoke in their reply brief and today have devoted much of their arguments to asking the court to ignore as much

history as possible. Sometimes they argue that the history is too early; sometimes that the history's too late; sometimes it's from the wrong state or sometimes it's from the city; sometimes it's from a court but not the right court. And either way, over and over and over again, the argument is asking your Honor to close your eyes and pretend that the history isn't there. But the *Bruen* test is about honoring history, not ignoring it.

And your Honor in your October 6th opinion took the history seriously. You looked at the statutes and the sources that we had adduced in previous litigation, you did research of your own, you found historical sources and you considered what they said. We obviously don't agree with all your conclusions and I'm going to do my best today to try to convince you why some of them should be changed or expanded, but your Honor's analysis of the history was genuine. You looked straight at the history instead of trying to find reasons to look away. That's what the *Bruen* test requires if it's going to be genuine, and we have faith that if your Honor continues to look the history straight in the eyes, that this motion will be denied.

First I want to just note something very briefly that I think was a major focus of Mr. Stamboulieh's argument and underscores just what we're looking at here. Mr. Stamboulieh, both in his argument here and in the

plaintiffs' briefing, argues that permitting itself is unconstitutional. On page 16 of their brief they say that the Second Amendment's plain text protects the right of people to bear arms in public without having to demonstrate anything to the government or obtain anything from the government such as approval or license. That's just wrong under *Bruen*. The majority says that, "To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 states' shall-issue licensing regimes, under which a general desire for self-defense is sufficient to obtain a permit." That's true of New York too. Permitting is absolutely constitutional. Similarly, Justice Alito says, "Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun, nor have we disturbed anything that we said in *Heller* or *McDonald* about restrictions that may be imposed on the possession or carrying of guns." Justice Kavanaugh, joined by Chief Justice Roberts, likewise says that, "The court's decision does not prohibit states from imposing licensing requirements for carrying a handgun for self-defense."

And so on the fundamental level, there is nothing unconstitutional about permitting. *Bruen* in fact endorses that, and this is going to be something that we run into a number of times when we talk about the arguments that the

plaintiffs are making. They are pushing for a vision of the Second Amendment that is not supported by *Bruen*, it's not supported by *Heller*, and it's not supported by the text of the amendment itself.

Before we get too far into the merits, I think there is some fatal issues of standing and justiciability that need to be addressed. There is still no injury in fact related to licensing. There's no standing here under *Decastro*, *Libertarian Party*, because no one has submitted an application and had it denied. And for that we cite to *Decastro*, 682 F.3d at 164. Because Decastro failed to apply for a gun license in New York, he lacks standing to challenge the licensing laws of the state.

Now obviously there is an exception that applies if a plaintiff makes a substantial showing that submitting an application would have been futile, but that's not the case here. Plaintiffs put forward two arguments for futility. First of which they point to the Onondaga County Sheriff saying that he isn't processing applications or at least not expeditiously. I don't personally know whether that's true, we don't represent the sheriff, but even if it is true, I think that may potentially give rise to a Second Amendment claim against the sheriff but it doesn't give rise to a constitutional claim against the licensing laws in general.

Second, they argue that there's futility because

plaintiff Sloane has decided unilaterally that he will not comply with the licensing requirements. But a party cannot create its own futility. Instead, and this is a quote from *Decastro* quoting *Jackson-Bey* case, "To establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy. For there to be futility, the plaintiff would need to show that, even if he submitted a full application, there's no chance that it would be successful." That's what the *International Board of Teamsters* case stands for. Put it another way. If plaintiff Sloane were to apply for a permit and provide the required information, is there anything before your Honor that indicates that the application would be denied? Is there anything before your Honor that indicates that he would be found to lack good moral character? Is there any indication that he would say something in the interview or that the interview requirement would be applied in a way as to deny him a license? I don't think that there is anything in the record to indicate that, and in fact, the plaintiffs say that plaintiff Sloane is law-abiding citizen and there's nothing in the record to indicate otherwise. And so there is no futility here, and certainly not as against the state defendants, and futility is not something that a private party can create for themselves.

Similarly, there's no injury in fact related to

sensitive places or private property. All that the plaintiffs have been able to show here is general public statements that the government intends to enforce the laws that are on the books. There's no specific threat of enforcement of any specific law against any specific plaintiffs. And the question here is whether the plaintiff will suffer a personal and individual injury beyond a generalized grievance, an injury that is concrete, particularized, and imminent rather than conjectural or hypothetical. And that's particularly important because so much of the argument that comes in is hypothetical. It assumes that New York will apply these statutes in an unconstitutional way. It assumes that there is -- there will be a bizarre application of the statutes and there's a question posed to your Honor, how do we know they won't do that. That's not the way the test works. That's not the way that standing is put together.

And so every time you see one of the hypotheticals, whether during oral argument or in the briefing, I'd encourage your Honor to ask yourself, did this actually happen or have the plaintiffs adduced facts showing that it is imminently, concretely likely to happen? And I don't think that that is the case.

In terms of the individual state defendants, there's no standing as against Governor Hochul. The court

noted in each of its two previous opinions that the Governor may not be a proper defendant and there's been nothing that's changed to show that she is. The Eleventh Amendment bars suit against her because the *Ex parte Young* exception only applies when an official-capacity defendant has a particular duty with relation to the challenged law. And we cite to a number of cases here including *Citizens Union*, *Roberson*, and the complaint in fact acknowledges that, "Governor Hochul is not the official to whom the legislature delegated responsibility to implement the provisions of the challenged statutes." Likewise, no plaintiff alleges that Governor Hochul has caused any injury directly to them. She doesn't rule on licensing applications, and there's no allegations that she herself has enforced the CCIA against any plaintiff in any way.

THE COURT: And it's the state position that her authority to direct the superintendent of state police is not enough?

MR. THOMPSON: I think that that would be inconsistent with the case law. If you take the plaintiffs' argument to where it's going, they talk about how the Governor could remove the head of the state police, the Governor could remove any District Attorney under the New York State Constitution, remove any sheriff or county clerk, that argument would create standing against the Governor for

virtually any legal or law enforcement act in the state and that's inconsistent with the law.

Similarly, there's this argument that Governor Hochul somehow changed how the NYPD applies the law but even if that were true, and there's nothing in the record about it, it would be irrelevant here. New York City makes its own decisions, New York City is an independent actor and no plaintiff alleges any injury connected to New York City.

Similarly, in terms of Judge Doran, there's no standing against Judge Doran. Unquestionably, undisputedly, no one has submitted an application to Judge Doran, no one has had an application denied. Your Honor in your October 6th opinion found that standing was proper because it was analogous to standing against Judge McNally in the *Bruen* opinion but the key difference is that there was an application submitted to Judge McNally, Judge McNally ruled on that application, he denied the application for a specific reason under a specific part of the statute and that gave rise to the ability to challenge that specific part of the statute. Here, there's been no application, there's been no denial, but the scope of what the plaintiffs want to challenge is vast, virtually comprehensive. And I think the *Libertarian Party* case controls here, where the Second Circuit found that there was no standing to sue a judge related to a licensing application unless one had been

denied.

Similarly on futility, if the sheriff in Onondaga County is not adequately processing applications, that may give rise to a claim against the sheriff, and let me just say on the record that I don't know one way or another if that's the case and I don't represent the sheriff, but it would not mean that there's standing as against Judge Doran who there's no allegation of futility related to him. And as we discussed, a party cannot voluntarily create their own futility. Judge Doran has not been given any application, he has not made a ruling on any application, and there's nothing before the court to indicate that a proper application submitted by plaintiff Sloane would fail.

In terms of Acting Superintendent Nigrelli --

THE COURT: There's nothing on the record that indicates that an application submitted would fail? How about his statement that he says he would not provide the names of his family?

MR. THOMPSON: Well, I think that goes to the question of creating your own futility. I think that there's nothing in the record before the court that indicates that if plaintiff Sloane submitted a full application, submitted to the policy as required under *Decastro*, there's nothing to indicate that his application would be denied. There's also nothing to indicate that if it were to be denied, what the

basis of that would be, for instance good moral character, you know, there's nothing to indicate that there would be something disqualifying in his social media.

THE COURT: I think it was just indicated Judge Doran follows the law.

MR. THOMPSON: I'm sure Judge Doran would follow the law.

THE COURT: Then necessarily that application would be denied.

MR. THOMPSON: I'm not sure that that's necessarily the case. It's possible that Mr. Stamboulieh would get up in front of Judge Doran, make the same argument that he's making to you, and maybe Judge Doran would agree with him.

THE COURT: Convince him not to follow the law?

MR. THOMPSON: Or convince him that the law requires him to do something else. Standing here today, as --

THE COURT: What else could he convince him to do if the applicant refused to provide those names?

MR. THOMPSON: If, if the plaintiffs were able to convince Judge Doran, as they're trying to convince your Honor, that this requirement is unconstitutional, Judge Doran as a state court judge is fully capable of finding laws unconstitutional under the federal Constitution. And I cannot tell you what he -- how he would rule on an

application made in front of him that's not in front of him, any more than a lawyer representing you could say how your Honor would rule on a case that you'll see a month or two months or three months from now.

In terms of Acting Superintendent Nigrelli, with regard to the licensing laws that he's only the licensing officer for retired members of the state police, which none of the plaintiffs are; your Honor in your October 6th opinion discussed the superintendent's role in approving the training curriculum but there's no injury alleged from the content of the curriculum with the exception of plaintiff Sloane's objection to the fact that it includes suicide prevention. I don't think that's a cognizable claim. There's no basis in the history for why someone would have an entitlement to a training curriculum tailored to them or that meets their approval, in fact very much the opposite in terms of what we're talking about in militia service. Beyond that, there's still no specific threat of enforcement -- I'm sorry, your Honor.

THE COURT: I was just wondering if you wanted to address the plaintiffs' argument about the onerous nature of the number of hours, the expense, or do you intend to cover that later? I don't want to --

MR. THOMPSON: I do intend to cover that later but I'm happy to vault into it right now if your Honor wants to

address it.

THE COURT: You do it the way you'd like to. Go ahead.

MR. THOMPSON: Thank you. Beyond that, there's still no specific threat of enforcement by the state police in specific directed at any specific plaintiff based on any specific element of the CCIA. That fact pattern is not here and standing rules are there for a very important reason. There's no case or controversy here with regard to any of the state defendants.

In terms of the facial challenge standard, and I'm -- I look forward to addressing your Honor's question, but this is a facial challenge, it is a pre-enforcement challenge to a criminal law statute and I think that under settled Second Circuit precedent, it is facial in nature. For that we'd cite to *Jacoby & Meyers v. Presiding Justices*, 852 F.3d at 178. Where a plaintiff makes a pre-enforcement challenge to a statute "before they've been charged with any violation of the law, it constitutes a facial rather than an as-applied challenge." And under that standard, because it's a challenge to the law on its face in its entirety and in all its applications, a plaintiff must show "that the law is unconstitutional in all of its applications." That's from the *Washington State Grange* case, 552 U.S. at 449.

And here in the October 6th opinion, the court has

found that there are constitutional applications of several aspects of the law. We may disagree with your Honor as to the scope of the constitutional applications and I look forward to discussing that with your Honor, but your Honor found that there was a constitutional application of the good moral character standard, of several of the sensitive locations including government buildings, places of worship, schools and universities, and other private property protection and that's all the analysis that there needs to be at this point in the facial challenge. Because there are constitutional applications of the statute, it should be facially upheld. And if New York or its cities or its counties apply it in an unconstitutional manner, then there can and should be, as your Honor said to Mr. Stamboulieh, as-applied challenges in the future.

And in particular, although we may disagree and we may have thoughts about what the sweep of the statute legitimately is, the court should not use its injunctive powers to essentially rewrite the statute through an injunction. For that we cite to *Picard v. Magliano* from the Second Circuit just this year, 42 F.4th at 104, in which the Circuit reversed the grant of facial injunction and said that it would not "delve into whether a more narrowly-drawn statute could surgically identify conduct that may be constitutionally restricted without impinging on other

conduct that's constitutionally protected." Writing and tailoring laws is something that the legislature does and can do in response to comments from the public and it's something that judges can do in the context of genuine and as-applied cases and controversies. It's not the right thing to do in the course of a facial challenge such as this one.

And your Honor had, before we got up and began the argument, had asked about whether this was a facial challenge or an as-applied one? Does this address your question?

So moving on to the merits, let's start with the private property protection because that's one of the areas that your Honor indicated was constitutional in some applications and I think it's one that's very central and one that Mr. Stamboulieh focused on.

I think it's important to start at first principles. There are two parts to the *Bruen* test -- one about text and one about history. And the plaintiffs have given no basis in their briefing or in their argument to conclude that the Second Amendment right to bear arms extends onto someone else's property, particularly without their knowledge or consent. This is a key part of the analysis and as much as the plaintiffs don't want to deal with it, it's their burden to show that the conduct at issue, carrying a gun onto someone else's property, is covered by the Second Amendment's plain text. There's nothing in *Heller*, there's

nothing in *Bruen* that suggests that the right to bear arms extends onto other people's property. *Bruen* stands for the proposition that the Second Amendment "guarantees," there's an ellipsis here, "a right to bear arms in public for self-defense," it's 142 S.Ct. at 2135. *Heller*, meanwhile, is contrary to that position. "There is no way that the Second Amendment could elevate above all other interests the right of law-abiding responsible citizens to use arms in defense of hearth and home," that's 554 U.S. at 635, "if it also guaranteed the right of strangers to carry concealed guns onto that same home without their knowledge and without their agreement."

It's also contrary to the fundamental constitutional right of private property which is equally fundamental and equally constitutional as the right to bear arms. And for that we cite the *GeorgiaCarry* case out of the 11th Circuit which rejected the contention that, "The individual right protected by the Second Amendment in light of *Heller* and *McDonald* trumps the private property owner right to exclusively control who and under what circumstances is allowed on his or her own premises."

The plaintiffs' discussion of this point on pages 36 and 37 of their brief cites no law for the proposition. All they do is call for the burden to be shifted onto us. And I think it would be extraordinary based on that and based

on the text of *Bruen* and *Heller* to hold that there is a Second Amendment right to carry guns onto other people's property without knowledge and without consent.

I think that's enough to resolve the issue on the first part of the *Bruen* test, but if we move on to the second part, we have provided the court with eight statutes from seven states stretching from 1715 through 1893 and just excerpting a couple of them, Pennsylvania 1721, "If any person or persons shall presume to carry a gun or hunt on the improved or inclosed lands of any plantation other than his own, unless he have license or permission from the owner of such lands or plantation," he will suffer criminal penalties.

New York 1763 establishes criminal liability "if any person or persons whatsoever other than the owner, proprietor, or possessor or his or her servant or servants," white servant or servants here, "do and shall carry, shoot, or discharge any firearm whatsoever." There are a couple of ellipses in this just so that I don't belabor all of us with the reading. "Into, on or through any orchard, garden, cornfield or other enclosed land whatever within the city of New York or the liberties thereof without license in writing first had and obtained for that purpose," in writing, not express, not verbal, "from such owner, proprietor, or possessor."

New Jersey 1771. The law says, provides for

liability "if any person or persons shall presume at any time after the publication hereof, to carry any gun on any lands not his own, and for which the owner pays taxes, or is in his lawful possession, unless he hath license or permission in writing from the owner or owners."

We have a couple more. Louisiana 1865 forbade "any person or persons to carry firearms on the premises or plantations of any citizen without the consent of the owner or proprietor." And this one was particularly fun because they also passed it in French.

Texas in 1866, "it shall not be lawful for any person or persons to carry firearms on the inclosed premises or plantation of any citizen, without the consent of the owner or proprietor."

THE COURT: And has the state done the historical analogy of those various ordinances and statutes during the period of time to indicate what they represent with regard to the entire picture of what was being enforced with regard to the Second Amendment at that time?

MR. THOMPSON: I'm not sure if I understand the question, your Honor, I apologize.

THE COURT: The analogy of, okay, you're talking about city ordinances, you're talking about state statutes and you know what those populations in the whole represent across the country at that time with regard to the

enforcement of the Second Amendment, has that been done, do you want to comment on that?

MR. THOMPSON: So each of these are state laws and it's over a significant period. When -- I'm still, I'm not totally sure if I understand your question and I apologize if I'm being dense, your Honor, what are you --

THE COURT: You heard the plaintiff talk about the fact that you need to look at the census material, you need to look at the time period to see how the -- it's being enforced, with respect to the entire country.

MR. THOMPSON: So I think there's -- I think the plaintiff has made more of that than the *Bruen* test requires. I think that if we've shown your Honor eight statutes from seven states over such a significant period --

THE COURT: You think that's enough.

MR. THOMPSON: I think it's absolutely enough. I think your Honor's analysis in the October 6th opinion was correct. It's --

THE COURT: So any statute that's been passed anywhere, a city ordinance, a territory, any of the states, regardless of size and population, would suggest a historical position that tells this court that that statute should be upheld?

MR. THOMPSON: I think any statute or any ordinance is certainly relevant and should not be brushed aside, should

not be ignored. I think the question of what a tradition is is a relevant one. I think your Honor struck a good balance in your October 6th opinion. And I think it's worth remembering here that when we look at a statute from history, from 1866 or from 1722, and we say that this is irrelevant, that it doesn't -- that it does not bear consideration, I think that is implicitly a finding that that statute is unconstitutional, that that statute that was passed at that time is unconstitutional because it's inconsistent with our understanding here in 2022. I think that would be an extraordinary position to take. And I think that *Bruen* requires us to be humble and to take history seriously. One of the great concerns I think that everyone, commentators have had after the *Bruen* test is that the goalposts will always move, is that there will always be a way to say, except for all this history, there's not enough history. And that's not what your Honor did in the October 6th opinion. That's -- and that's not what we think that you should do now.

We would also say that *Bruen* at no point required a majority of states, and in fact in some of the areas that *Bruen* looks at, in particular in the sensitive places areas, the -- they noted that there was at points scant historical evidence for some of the locations that they talk about, like schools and courthouses, and yet they said that there was no

question about the lawfulness of these prohibitions. So I think that the -- when you look at history, we need to look at history humbly and we need to not brush it aside.

THE COURT: But don't you, do you think -- I'm not suggesting that we brush it aside, but as a part of the evaluation, are there different weights that they should be given based on the population that that statute is addressing?

MR. THOMPSON: That's a good question. What I would say is we don't give different weights to different state laws today, we don't say that a law in South Dakota is less viable than a law in New York because New York is bigger. I think certainly every law merits consideration. We could maybe say that the laws that we talk about in New York or New Jersey are more important than the laws we talk about in Maryland or Oregon, but I think that does a disservice to federalism frankly. It's certainly possible to say that some laws are more meaningful than others, but I think every law is meaningful at least to some extent. And every law needs to be looked at and considered. And certainly in this case on a practical level, eight laws from seven states over such a long period of time, it's difficult to, it's -- I shouldn't say that, but that is a very substantial showing, and I think not one to be brushed aside lightly.

Similarly, these laws are not merely to stop poaching. The plain text of the statute shows that their purpose applied to carrying of guns, protecting private property, not merely to stop poaching. We quote from a number of these statutes in the brief, "to carry any gun or hunt" from Pennsylvania, "carry, shoot or discharge any musket" from New York, "carry any gun on any lands not his own" from New Jersey. To carry firearms, it's not just about hunting. We did drop a footnote in our brief with a handful of state laws that were about hunting on other people's property and limited their scope to carrying guns on other people's property for purposes of hunting in specific. I think those statutes only further bolster the constitutionality here because it shows that the carriage could be regulated.

Similarly, there's no limitation in these statutes to fenced-in farmland or fenced-in hunting land. The text of the statutes are broader than that. In many cases the statutes deal with areas like woods or gardens or orchards that are specifically not fenced in, and many of these statutes don't contain any limitations as to enclosure. Furthermore, the term enclosure is understood broadly to mean any land that is set off from, you know, from the wilderness, any land that's set off to indicate private property, I think very much including buildings. And many of these statutes

talk about plantations or premises, and Black's defines premises as the house or building along with its grounds. So I think these laws cannot be so limited merely to fenced-in farmland.

And we also cite to, again, the *GeorgiaCarry* decision which says that, "An individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land." And that was decided, again, through historical analysis on the first part of the then-dominant *Heller* analysis.

THE COURT: And again, you take the position of the default situation where the state's, you know, making the decision for the property owner, it's not about informed consent, it's about it being illegal unless the property owner says no, your gun is welcome here, and says so publicly?

MR. THOMPSON: I think it's -- I think it's absolutely about informed consent and the reason that the default is set where it is is because if the default is guns allowed, then someone can carry onto someone else's property, into someone else's home without ever needing to tell the property owner that the gun is there.

THE COURT: Don't those other statutes do exactly

that?

MR. THOMPSON: No, they don't.

THE COURT: Say you need to get informed consent?

MR. THOMPSON: Yes, they say you need to get informed consent and that's what New York statute requires, it's entirely constitutional and entirely supported. Informed consent is, I don't think there's anything unreasonable, unconstitutional, or unhistoric about it.

THE COURT: You say the New York statute's no different than the ones you've cited.

MR. THOMPSON: I think it accomplishes the same fundamental thing.

THE COURT: That's not my question. It's no different?

MR. THOMPSON: I think there's, between informed consent and express consent, I wouldn't say no difference, some of these statutes require consent in writing historically. New York only requires express consent. Your Honor said briefly earlier that it requires a public statement, it does not require a public statement. A private statement, a verbal statement, any form of express consent satisfies the statute. And there's nothing ahistorical and there's nothing unconstitutional about that requirement.

Your Honor, moving on to the good moral character standard, your Honor found in your October 6th opinion that

the standard was constitutional to the extent that an applicant could be disqualified based on a finding about his or her conduct and so long as the standard was not applied in such a way as to bar lawful self-defense. State defendants would submit that the constitutionality of the statute is not so limited but for the purpose of facial challenge, that's enough to end this analysis. Under the facial challenge standard, a plaintiff can only succeed by establishing that no set of circumstances exists under the law under which the law would be valid. That's, again, the *Washington State Grange* case. Your Honor found that there was a set of circumstances in which it would be, and that's enough to settle the issue. And it's entirely consistent with the Second Circuit's holding in *Libertarian Party*.

As an initial matter, the conclusion stems from the first step of the *Bruen* analysis. Again and again, in *Bruen* and *Heller* and *McDonald*, the court emphasizes that the people as used in the text of the Second Amendment refers to law-abiding responsible citizens. But undisputedly, some people aren't law-abiding or responsible and the Second Amendment is not implicated if they're denied the ability to have the power of life and death over their fellow citizens. The good moral character standard and the equivalent standards from 43 other shall-issue licensing states is how we figure out which is which. And the *Bruen* court

acknowledged that licensing laws are constitutional when they "are designed to ensure that applicants are in fact law-abiding responsible citizens."

The same conclusion stems from the *Libertarian Party* case in the Second Circuit which upheld the previous good moral character requirement which is broader and less defined than the one that we have currently on the first step of the *Heller* analysis. The Second Circuit held that the statute as it was previously "does not burden the ability of law-abiding responsible citizens to use arms in defense of hearth and home." That's 970 F.3d at 127. The Circuit also exampled -- identified examples of several sound bases where the standard could constitutionally lead to the denial of licensing application "such as threats to harm others or his addiction to drugs or his repeatedly reckless conduct with a weapon while intoxicated." It's from 970 F.3d at 126. Those examples I think would satisfy your Honor's standard as well, as laid out in the October 6th opinion. And those examples are enough to sustain the facial constitutionality of the statute.

The Second Circuit in *Libertarian Party* found that the definition of good moral character was not difficult to understand and that examples of its application "are not beyond an ordinary person's comprehension, nor are they rare." And the CCIA has only made this definition of good

moral character clearer and more precise since.

Now the plaintiffs talk about a bunch of bizarre scenarios where licensing officials would implement this requirement in an abusive way, but there's no evidence of that, certainly not in the case of any specific plaintiff. And the Second Circuit noted in *Libertarian Party* that the plaintiff in that case had not "alleged that any law-abiding responsible citizen who has applied for a New York firearm license has been denied." That's from page 128 of the opinion. And the plaintiffs have not alleged that either.

Now the plaintiffs have misstated the law in their reply where they imply that the Second Circuit has somehow implicitly overruled the *Libertarian Party* case in *Sibley v. Watches*. Your Honor can read the *Sibley* order on Westlaw as well as the rest of us, it was a, you know, a standard remand order because the case was pending when *Bruen* was decided, they remanded to the District Court "to consider in the first instance the impact, if any, of *Bruen* on Sibley's claims." They also said, "We express no view as to that issue or any other issue that may arise." So there it does not mention *Libertarian Party*, it does not cite *Libertarian Party*, it certainly does not indicate that any part of the *Libertarian Party* case was implicitly overruled.

So as your Honor discussed with Mr. Stamboulieh, the good moral character standard as revised and narrowed by

the CCIA is fully consistent with *Bruen* and the other shall-issue state laws discussed in that case.

Now before we get into that comparison I just want to address, your Honor in your October 6th opinion indicated that you view the statute as containing a negative presumption where the applicant must persuade a licensing official of their character and that there is, the applicant must rebut a presumption that he or she is a danger to himself or herself. That's not what the statute says, that's not in the text of the statute, there is no such negative presumption in the statute. All that's required is that the licensing officer find that the applicant has the character, temperament, and judgment necessary to be entrusted with a weapon and use it only in a manner that does not endanger oneself or others. There's no negative presumption there, just a straightforward standard that's similar to those of other shall-issue states. In fact the New York standard is much narrower and less discretionary than many of those states.

THE COURT: In what way?

MR. THOMPSON: So we put up examples for your Honor of many, of several of those states that have standards that are really about character or suitability. We talked about Connecticut, Rhode Island, Georgia, and Indiana, where they have statutes that just say good moral character, period. Or

suitability, period. Or a suitable person, where it is really about the judgment of the person in general and their character in general and that, even that sort of statute was endorsed by the court, by the *Bruen* court, and I think would be consistent with *Libertarian Party*.

But the New York standard is narrower than that because New York ties its determination specifically to dangerousness; to the question of whether the person is going to be a danger to others or to themselves. That's a narrower standard than one that's about character. And that puts us in line with many of the other states. We have I think a lengthy string cite in our brief but just as an example, in Pennsylvania, the question is "whether the applicant's character and reputation are such that the applicant will not be likely to act in a manner dangerous to public safety." Montana, it's about whether the person "may be a threat to the peace and good order of the community to the extent that the applicant should not be allowed to carry a concealed weapon." These are standards that are about dangerousness, not character. And New York's standard fits comfortably into that area.

Now different states have different standards and that's fine, under the *Bruen* opinion. They are all shall-issue states and the *Bruen* opinion makes clear that "to be clear, nothing in our analysis should be interpreted to

suggest the unconstitutionality of the 43 states' shall-issue licensing regimes, under which a general desire for self-defense is sufficient to obtain a permit." That's true in New York as well. And so I would submit to your Honor that a formulation of the Constitution that indicates that some of these states' standards are unconstitutional and some of them aren't would be inconsistent with the court's holding in *Bruen*. *Bruen* said that all 43 of these states are constitutional. And New York says as well, a general desire for self-defense is sufficient to obtain a permit, there's no proper cause requirement. New York State's falls into that, the same group as the other shall-issue states and it's constitutional just like their laws are.

THE COURT: Can you tell me where in *Bruen* it says all 43 of those states' statutes were found to be constitutional?

MR. THOMPSON: I don't have the pin cite but I believe it's footnote 9, but again, that's a direct quote, "Nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 states," and I think that --

THE COURT: That's different than what you just said.

MR. THOMPSON: I don't -- I don't think it is. I think that to the extent that there is an argument that *Bruen* implicitly found those states' regimes unconstitutional,

that's clearly against what the court is saying.

THE COURT: Okay.

MR. THOMPSON: Your Honor, I'm happy to address that if you see a distinction that I don't.

THE COURT: You're saying two different -- that's not what *Bruen* said. It doesn't, it's -- there's nothing in that decision that says that those 43 shall-issue states' statutes are constitutional.

MR. THOMPSON: It's, I guess --

THE COURT: There's nothing to presume that they're unconstitutional at this point, but I don't know if they've gone through this process at this point after *Bruen*, so to stand there and say that the Supreme Court said that all 43 states who have shall-issue statutes are constitutional is just disingenuous.

MR. THOMPSON: I apologize, I certainly would never intend to be disingenuous to the court. I guess I have a hard time seeing the daylight between nothing in this opinion says they're unconstitutional and saying that they are constitutional, and in fact if you look at --

THE COURT: Because doesn't the decision suggest that this process is going to occur across the country and there's going to be challenges and analysis of those statutes just like is going on here? Isn't that what that would suggest?

MR. THOMPSON: I'm not sure, and your Honor, I would point to the Kavanaugh and Roberts concurrence that says that the 43 states that have these shall-issue regimes can continue to use them. I'm paraphrasing, that is not quoting directly, but, and I suppose the question, I suppose the question would be based on where the source of the challenge is, but *Bruen* I think says that the challenge can't come from *Bruen*, *Bruen* says that nothing in *Bruen* suggests their unconstitutionality. And so I don't think that there's any basis from the *Bruen* decision to find that some of these state statutes are unconstitutional. I think, if anything, both the majority opinion and Justice Kavanaugh and Chief Justice Roberts are saying quite the opposite. And Justice Alito --

THE COURT: So what you're saying is your position is that the Supreme Court did that analysis of those 43 states?

MR. THOMPSON: I think that the Supreme Court endorsed their constitutionality, yes, and emphasized that *Bruen* as a decision should not be read to, in a way as to render them unconstitutional.

THE COURT: Okay.

MR. THOMPSON: So yes, that's --

THE COURT: Okay.

MR. THOMPSON: I'm sorry, your Honor, I certainly

didn't mean to talk over you.

THE COURT: No, that's fine, go ahead.

MR. THOMPSON: So in terms of the historical analogues here, I won't belabor this point because we're -- we have a lot to discuss and your Honor's well familiar with them, we talked about five different groups of analogues, laws providing for the disarmament of dissident or hostile groups, revolutionary laws, disarming persons disaffected to the cause of America.

You know, the plaintiffs again in this case put in their sort of hypothetical of William Floyd, New York's delegate to the Constitutional Congress countenancing, sitting down with the licensing official but in fact it was the Constitutional Congress in March of 1776 that said that Americans needed to appear in person to swear loyalty or be disarmed. We talked about militia mustering statutes that provided for disarmament if a person was inspected and found unfit to be carrying arms. We added a couple of references in our opposition this time to proposals at the Constitutional ratification conventions.

For instance, Pennsylvania said that "no law shall be passed for disarming the people or any of them unless for crimes committed or real danger of public injury from individuals." Massachusetts likewise said "no law to prevent the people of the United States who are peaceable citizens

from keeping their own arms." This is discussed in the *Coombes* case, 2022 WL 4367056. And all of that goes to the point that if there is indicia of dangerousness, an indicator that a person is dangerous, it is entirely consistent with history that that person be disarmed.

Lastly, we also talk about 19th century licensing requirements like New York City's, I think we put it, we put in, we kept our examples only to New York just because we're New York, but a number of examples from Brooklyn, Buffalo, here in Syracuse. And there are similar examples across the country of statutes requiring someone to appear in person, apply to the officer in command of the station house or the precinct where he resides, here I'm quoting from 1878 New York City licensing law, and that if the officer was satisfied that the applicant is a proper and law-abiding person, the officer would make a recommendation to the chief of police. And again, we've included a bunch of other New York laws, we could have included similar laws across the country, but again, we felt like we had deluged the court in enough paper as it was.

THE COURT: Certainly done that.

MR. THOMPSON: Well, we try, your Honor. So your Honor in your October 6th opinion found that this history showed that the statutes "treated people as being entitled to a firearm unless they posed, or more specifically, found by

the government to pose such a danger." I'm not sure if that's quite right since there are a number of statutes that provided for disarmament unless someone physically appeared and swore an oath or otherwise showed that they were not a danger. But in any event, I think it's undisputed that if someone is found to be a danger, if there are indicia of dangerousness that there's no entitlement to a firearm as the court indicated, and that undisputedly constitutional application is enough to defeat a pre-enforcement facial challenge.

I want to push back a little bit on Mr. Stamboulieh's argument that the good moral character standard is impermissibly discretionary, that it allows a licensing official to deny a license for any reason or no reason. There is a body of law in the Supreme Court and the Second Circuit stemming from the First Amendment case and this is the same body of law that the Supreme Court cited in *Bruen*. And the interpretation of this law establishes that standards that are tied to dangerousness or safety "are reasonably specific and objective and do not leave the decision to the whim of the administrator." That's a quote from the *Field Day* case, 463 F.3d at 179.

First, in the *Libertarian Party* case, the Second Circuit already determined that the prior good moral character standard which, again, is broader than the one that

we have now after the CCIA, was not unconstitutionally vague. The Circuit found that it was not beyond the ordinary person's comprehension, that it was "easily understandable", that there was "no evidence of confusion" and that "the repeated use for decades without evidence of mischief or misunderstanding suggests that the language is comprehensible." That's from 970 F.3d at 126-27. And the fact that the new CCIA standard is tied to safety and to dangerousness is adequate to cabin any impermissible discretion. For that we cited to *Thomas v. Chicago Park District*, 534 U.S. at 324, which upheld a standard allowing for the denial of a permit when there was "an unreasonable danger to the health or safety of park users," and to the *Field Day* case, 463 F.3d at 180-81 which the Circuit held that the challenged law "establish[es] an objective test," and that that test was "whether unreasonable risks to genuine issues of life or health are presented." So when there's a statute that's tied to safety or dangerousness, that is a standard that is not impermissibly subjective or discretionary.

And as the Circuit said in *Field Day*, "Perfect clarity and precise guidance have never been required even of regulations that were strict [constitutionally-protected] activity," constitutionally-protected is in brackets, I think it says First Amendment in the case itself. Continuing with

the quote, "and flexible standards, including considerable discretion to public officials, can pass constitutional muster." That's a quote from *Field Day*, 463 F.3d at 179, quoting *Ward v. Rock Against Racism*, 491 U.S. at 794.

So we would submit that the standard here which talks about potential harm to oneself or others is not impermissibly discretionary, it's a standard that can be applied in an effective and in a constitutional manner.

Moving on to the question of licensing procedures. The court in its October 6th opinion sustained the character reference requirement in that, in both of your Honor's opinions. The in-person interview requirement your Honor found constitutional in *Antonyuk I* but unconstitutional in the October 6th opinion. We would submit that both provisions are constitutional based on historical antecedents and that those antecedents allow for an assessment of someone's reputation and required an in-person appearance.

So for instance, the Massachusetts law disarming followers of a dissident preacher did so insomuch as there is just cause of suspicion that they might become violent, and it names specific persons but they also allowed that if any of them appeared before a magistrate and made an oath, that they would not be disarmed.

Similarly, many of the laws targeting people for group membership had a reputational element to determining

whether someone would be subject to the law but also provided that the person would not be disarmed if they appeared in person and gave assurances that they were not dangerous and took an oath of allegiance. Likewise, the revolutionary loyalty laws enacted at the order of the 1776 Continental Congress required people to come and take an in-person oath of loyalty and not be disarmed. So Pennsylvania said, "Take and subscribe the following oath or affirmation before some one of the justices of the peace of the city or county where they shall respectively inhabit." And these requirements frequently had a reputational element, so for instance, New York's applied to "all persons," and there's an ellipsis here, "who are known to be disaffected to the cause of America." Militia mustering laws likewise involved an in-person assessment of someone's fitness to bear arms and people who failed would be disarmed and court martialed.

Nineteenth century licensing laws also generally involved an in-person appearance at one's local police precinct and then a recommendation by the local officers to the superintendent or to the chief of police.

Moving on to the discussion of training which your Honor raised earlier, your Honor already upheld this requirement twice in both *Antonyuk I* and in your October 6th opinion. Training is specifically endorsed and called for in the text of the Second Amendment. As *Heller* noted, that "the

adjective well-regulated applies nothing more than the imposition of proper discipline and training." So training is core to the Second Amendment and training requirements are explicitly contemplated in both *Heller* and *Bruen*.

And when you look at the historical analogues for what training was required in the Founding Era, New York's training requirements are far, far less than what was required. We've put a number of statutes before your Honor, but the statutes show that people could be mustered for training up to six times a year and for up to six hours or more per session. New Jersey had a law requiring six hours but other states had no upper limit on the number, on the length of time in a particular session of militia training. You do the math on that, you're talking about a requirement greater than the CCIA's requirement, and that's every single year until a person turns 45. Certain people were exempted, judges were exempted, but the rest of us were all going to be out there marching and being trained.

Today's requirement applies just once for people like the plaintiffs who are applying for a license upstate. It applies only once, only when you apply, for an initial carry permit.

In terms of cost, let me just point out to start with that the costs of the training are not imposed by the state. The state does not set a fee for how much the

training costs. And historically, participating in training was both mandatory and expensive. A citizen had to leave his home and often their farm with a significant opportunity cost, a citizen had to provide all his own weapons, ammunition, equipment, pay for food and drink, travel significant distances. All of this was at the citizen's own expense as the militia would only pay and were only given rations in times of "actual service."

THE COURT: Is there any threshold amount which would be seen as an impediment to the exercise of their Second Amendment right?

MR. THOMPSON: It's a good question. First of all, I would say that that amount would have to be state imposed for the question to be presented, and certainly there's no -- there's no indication with respect to any specific plaintiff here that that question is posed to them. I'm not sure what that amount would be, but certainly the *Kwong* case which we cited, which Mr. Stamboulieh refers to, indicates that that amount would be far higher than what's contemplated here.

THE COURT: Plaintiffs' counsel in his argument indicated that he expects that it would cost $1,000 at least to, for an applicant to exercise their Second Amendment rights by satisfying the training requirement. Your reaction to that and is that an amount that's acceptable?

MR. THOMPSON: I think that's a hypothetical that's

not, that there's no evidence for that in the record. It's -- that number is much higher than my understanding of what's offered at a number of places throughout the state of New York. That number is, you know, also not something that is imposed by the state. This is not a fee that is set by the state, it's set by private trainers. There is nothing requiring that licensing classes can't be given pro bono or for any amount. So that's something that is set by the private market and not by the state. But, and again, I think it's one that's not established in the record and not before the court on a facial challenge.

Your Honor, in terms of requesting additional information in connection with a licensing application, I think that requirement could only be struck down if there were no set of circumstances where it was ever permissible to ask a question that is not specifically enumerated in the statute. I think we can all imagine harmless and anodyne questions. And also no plaintiff has standing to raise this challenge, no plaintiff has been asked any question that they view as inappropriate in connection with an interview because no plaintiff has gone to an interview. So if such a situation were to arise in future, it could be dealt with in an as-applied challenge, but there is no basis for a facial invalidity of that part of the statute, as your Honor found in the October 6th opinion.

Moving on to the social media disclosure provision, and to be clear, the social media disclosure requirement does not work the way that the plaintiffs have portrayed it in their papers. All that is required is "a list of former and current social media accounts from the past three years." That's all that it requires. Nothing in the statute requires that applicant disclose their nonpublic posts, turn over their passwords, make the licensing official your Facebook friend, and I appreciated -- I interpreted Mr. Stamboulieh, I won't put words in his mouth, but I believe he acknowledged in his portion of the argument that the list is all that's required by the statute. *Bruen* states in specific that states may require a background check as part of the licensing process, 142 S.Ct. at 2138, footnote 9. Justice Kavanaugh and Chief Justice Roberts specified that this can involve fingerprinting and a mental health records check, page 2162. Those are also anachronistic requirements without any 18th century antecedents. I don't know what the 18th century version of fingerprinting was, but the court has told us that fingerprinting is a constitutional application here. And there's no question --

THE COURT: So you see the social media as analogous to these other --

MR. THOMPSON: I see social media analysis as analogous to the inquiry that would be done in connection

with these other statutes in terms of looking at someone's reputation, looking at whether someone is dangerous. I think that the historical tradition establishes that it is constitutional for licensing officials to look into whether a person is dangerous and to cabin that inquiry into whether, into dangerousness itself but to look into the question of dangerousness in a way that is appropriate for the time.

THE COURT: But again, there's no historical analogous statute that you can point to.

MR. THOMPSON: I think it depends on how tight the analysis goes. Your Honor in your October 6th opinion talked about, is there something requiring persons to disclose the pseudonyms that they used while publishing political pamphlets or newspaper articles. That would be the "dead ringer" as *Bruen* talks about, but *Bruen* says that a dead ringer is not required; instead, what you need is something analogous. And the court similarly emphasized that in areas implicating unprecedented societal concerns or dramatic technological changes, there should be a more nuanced approach, and this is an example of where that should be. And I think *Bruen* gives us an example of why the analysis needs to be flexible and this is a, this is an analogue that *Bruen* specifically discusses when it talks about the types of weapons that are permitted under the Second Amendment. The Second Amendment does not only permit muzzle-loaded muskets

as were the standard in 1791. The court looked at the history and tradition and found a principle that unified the history and tradition which is that the Second Amendment protects guns that are commonly in use for lawful purposes.

Similarly, the history and tradition establishes that there can be an assessment of dangerousness, and I think that general principle, the assessment of dangerousness, is what the history establishes and I think that here in the third decade of the 21st century, it's entirely reasonable that that assessment would include a look into someone's social media. We have seen too many examples of when that was not done and when there was social media presence, public posts that would have warned us of an upcoming massacre.

Similarly, you can look to *Libertarian Party* where the Second Circuit identified examples of several sound bases for denying requests to possess a firearm such as threats to harm others, such as addiction to drugs, or repeatedly reckless conduct with a firearm while intoxicated. All of these can show up on social media and there's no reason why the licensing process shouldn't be able to look for and consider them and shouldn't be able to know what the --

THE COURT: All those examples would show up someplace else as well, without getting into somebody's social media, isn't that right?

MR. THOMPSON: I'm not sure.

THE COURT: Police records?

MR. THOMPSON: I'm not sure, they could show up in police records but they could also show up in social media and not be reflected in police records. Police records only show up once there has been a crime committed or at least an arrest made. The question is can the licensing official look into the person's public profile, their public posts that they themselves have shared and for these indicia of dangerousness and I don't think there's any reason why that would be unconstitutional or ahistorical.

THE COURT: And is there a standard with regard to what indicates dangerousness in this social media search? Is it somebody espousing that they thought the January 6th, you know, assault on the Capitol was appropriate, is that enough to say that they should not get a weapon?

MR. THOMPSON: So two answers to that question.

THE COURT: And I know we're getting into hypotheticals and that's not what we're here to do --

MR. THOMPSON: That's the first answer.

THE COURT: -- and that's what you're about to say, but is there a standard?

MR. THOMPSON: Yes.

THE COURT: Let's answer that question.

MR. THOMPSON: The standard is what's provided for in the statute, the standard is the good moral character

standard, whether someone is likely to use a weapon in a way that is going to endanger himself or others.

THE COURT: Other than self-defense.

MR. THOMPSON: I think --

THE COURT: That you suggest is presumed in your statute.

MR. THOMPSON: I think we would certainly agree that if someone were to be denied a license based on a finding that they were -- that they would engage in lawful self-defense, that would be unconstitutional, yes. I don't think it's required to be in the statute, expressly, just as it isn't in many other shall-issue states, but we certainly would agree that they would be an unconstitutional application.

THE COURT: The effect of that is it gives your licensing officer more discretion.

MR. THOMPSON: I don't think it does. I think that the -- I think that that's the entire point of having as-applied challenges. We don't --

THE COURT: So the licensing officer who will decide what's appropriate self-defense when they look at somebody's history.

MR. THOMPSON: I don't -- I think that if the -- I think that if that were to happen, then there would be review of that decision and that that review of that decision which,

again, has not been made certainly --

THE COURT: Your position would be as-applied standard.

MR. THOMPSON: I think that that would be dealt with in an as-applied challenge and certainly we would agree with your Honor that if someone were to be denied a firearms license based on a finding that they would engage in lawful self-defense if threatened, I think we would certainly agree that that would be an unconstitutional application.

Moving on to the question of sensitive locations, your Honor.

THE COURT: Excuse me, I'm sorry, go ahead.

MR. THOMPSON: I think we certainly appreciate the clarity that we've gotten, or at least partial clarity we've gotten from Mr. Stamboulieh in terms of what's being challenged. I think we've noted at every stage of the litigation that the waters were muddy as to what exactly the plaintiffs were challenging and what the basis of their challenge was, and that the -- and that the question of the plaintiffs' standing to challenge any of the individual sensitive locations was often, let's just say highly dubious. The assertion that their standing to challenge public transportation because plaintiff Mann's church van counts as public transportation if they organized a hunting trip, I think that's incredibly dubious. We know what public

transportation is, it's not a church van.

Similarly, the injunction against prohibition on guns in locations managed by state agencies like the Office for People With Developmental Disabilities, Times Square, we appreciate Mr. Stamboulieh saying that these are not being challenged, but it was certainly news to us that they weren't being challenged, as I suspect it was news to the court because your Honor enjoined several of them in the October 6th opinion.

So I think in many cases, the basis for standing is dubious at best. Because it was not clear what they were challenging, we tried to give the court sort of an overarching theory of sensitive places, of the categories of places that have historically been considered sensitive. I'm happy to walk through those with your Honor, starting with government property.

In *Heller*, Justice Scalia endorsed laws forbidding the carrying of firearms in schools and in government buildings and stated that such laws were presumptively lawful. Justice Thomas reemphasized that in *Bruen* saying that, "We are aware of no disputes regarding the lawfulness of such prohibitions," and similarly Justice Kavanaugh joined by Chief Justice Roberts --

THE COURT: I don't think there's any issues there, let's get to the ones that they are challenging.

MR. THOMPSON: Great. So we also speak about places critical to other constitutional rights, the right to vote, right to representative government, right to free exercise of religion. As your Honor found in the October 6th opinion, "Based on historical analogues, it is permissible for New York State to generally restrict concealed carry in a place of worship or religious observation." Your Honor based that conclusion on six historical analogues from your own research. We've supplemented that in our briefing, we put in at least seven state laws and four state supreme court decisions. Your Honor in your opinion raised concerns indicating there should be an exception for persons who have been tasked with the duty to keep the peace in a place of worship. I think that's very reasonable as a policy concern. Section 265.01-d(3) contains a list of exceptions that we hope addresses or mitigates those concerns, including federal law enforcement, police officers, security guards, and active duty military personnel.

THE COURT: And that's found where?

MR. THOMPSON: It is Section 265.01-d(3) so same statute, further down below the list of sensitive locations. To be sure, there are statutes from well before the founding of America that required persons to bring firearms to church. Those statutes do not "cancel out the history" that the state defendants have adduced as the plaintiffs asked that they do.

If anything, they show that presence or absence of firearms was a valid subject of government action. And so there is absolutely a tradition that supports the banning of guns in places of worship. People should be able to worship God without worrying that guns are around them.

We talk about the right to a fair trial, due process, jury service. That's, and that tradition is what allows the magnetometers outside the courthouse that we all walked through today.

And we talk about the right to peacefully assemble as being a fundamental right. As your Honor noted in your October 6th opinion, it appears permissible for New York State to restrict concealed carry in any gathering of individuals to collectively express their constitutional rights to protest or assemble. And in addition to the five different state laws that your Honor pointed to in the October 6th opinion, we added in the Supreme Court ruling from *Illinois v. Presser*, 1886, finding that laws that "forbid bodies of men to ... drill or parade with arms in cities or towns unless authorized by law do not infringe on the right of people to keep or bear arms." This is another area where history is consistent with common sense. There is a massive potential for violence and intimidation, either from large groups assembling while armed, or from large groups of people assembling unarmed who deserve the right to

express themselves in peace and free from intimidation.

We talk about the locations containing vulnerable people, I'm not sure how deeply we need to go into that given the plaintiffs' restriction on what they're challenging and so we'll stand on our papers on that. Other than to say that vulnerable people were understood to be outside the phrase "the people" who were able to carry arms to defend themselves and so they should be able to rely on the laws to defend them.

We also talk about a category of places where there are large groups in confined spaces, and history supports the idea that weapons can be prohibited in such places because of the dangers that they pose. This category includes laws on fairs, markets, race courses, ballrooms, social parties, a circus, a show or public exhibition of any kind, a ballroom, social party or social gathering and the discussion of places of public assembly. What sets all of these, the through line of all of these areas is that these are places where people gather together, in confined spaces, where people are vulnerable, where they are often distracted, and where engaging in self-defense in using firearms is not practical and would cause as great a harm to public as it might to an aggressor.

To be clear, *Bruen* states that the category of sensitive places cannot be expanded to all places of public

congregation that are not isolated from law enforcement because that would in effect exempt cities from the Second Amendment. Obviously we cannot, do not declare all of Manhattan a sensitive place. But *Bruen* does not state either in its holding or in *dicta* that concentration of people is irrelevant to making a place sensitive, and history supports the idea. So all of Manhattan is not a sensitive place but Madison Square Garden is, Carnegie Hall is, and so is a packed subway train at rush hour.

Moving into the specific statutory provisions discussed in the October 6th opinion, unless your Honor wants to get into any of them, I think it best in the interest of time not to go into the ones that your Honor upheld beyond what we already have said.

In terms of the challenge to libraries, playgrounds, parks, and zoos, I believe Mr. Stamboulieh said that they're not challenging libraries so I won't address that here.

Playgrounds I think are pretty clearly analogous both to parks and to schools. I'm not sure what principle distinction there is between schools and playgrounds, they're both places where children congregate and family and caregivers congregate and where guns do not belong on that basis.

In terms of public parks, parks were really sort of

in their infancy as an institution during the relevant period, but we've given your Honor eight examples of statutes prohibiting guns in parks in New York, Philadelphia, Saint Paul, Detroit, Chicago, Salt Lake City, and Pittsburgh, and I'll represent to your Honor that we could have given your Honor at least as many more on top of that.

Zoos I think are analogous to parks and to schools, they're places where people come together for education, literary, scientific purposes, and in particular, the three oldest zoos in America are the Central Park Zoo in New York, the Lincoln Park Zoo in Chicago, and the Philadelphia Zoo which is located in Fairmount Park in Philadelphia. All three of those zoos are covered by statutes we put before your Honor, and that's at Exhibits 57, 58, and 74.

Summer camps, programs authorized by office of care services, Mr. Stamboulieh indicated that he wasn't challenging those so we can go through them.

Child care providers and child care programs, my notes don't indicate whether they're challenging that. I will just say briefly those are clearly analogous to schools and for that we would cite the *Warden* case, Western District of Washington, where, "The court sees no logical distinction between a school on the one hand and the community center where educational and recreational programming is also provided on the other." I don't think that there's a

principle distinction to be drawn between schools and child care facilities in terms of what is sensitive.

State license programs for vulnerable populations, I believe Mr. Stamboulieh said that they weren't challenging that so I won't address it unless your Honor wants me to.

It's not clear whether they're challenging -- or actually I think they say they are still challenging subsections B and K of the statute. Let me just say that I don't think that they properly allege a sufficient connection to either of them for standing purposes. Subsection K is the one that covers "homeless shelters, runaway homeless youth shelters, family shelters, shelters for adults, domestic violence shelters, and emergency shelters and residential programs for victims of domestic violence." What ties these locations together is that these are all residential facilities for vulnerable populations. The plaintiffs don't operate or carry weapons into any such facility, I don't think they've alleged that.

THE COURT: The allegation of Reverend Mann you're saying doesn't do that? Or affidavit, excuse me.

MR. THOMPSON: So the argument that they made in their papers was that churches, and this is a quote from the reply at pages 33 and 34, "The CCIA does not define shelter, and churches have long been seen as shelters for those suffering from addiction, abuse, criminals, and even

governments. The Catholic church sheltered Jews from the Nazis during World War II." And I think the linked article, let's just say does not fully support that. But I think that the question of whether a church would count as a shelter under these --

THE COURT: It was more that he was going to be going to these shelters and would be carrying.

MR. THOMPSON: I don't believe that's been specifically alleged. If I'm wrong about that, then I apologize and I'm sure your Honor can scrutinize the affidavits as well as I can. What I would say is these shelter facilities are defensible under the category of sensitive places that include vulnerable populations and in many of these cases, they include significant numbers of children. So even if your Honor were to view the category of sensitive places as only involving children, certainly family shelters, domestic violence shelters, homeless shelters are all going to contain children. But more broadly, I think this speaks to one of the core issues of standing, as it applies, as it is applied in the sensitive place context. Oftentimes, the allegation of standing depends on a hypothetical where New York is going to apply these statutory terms in a way that does not necessarily make sense. So you know, the question of whether a church is a behavioral health facility, there's no evidence before your Honor that New York

would apply, would apply the statute that way, New York would interpret it that way. If New York were to interpret the statute that way, I think that would give rise to an as-applied challenge, but I think in each case, your Honor needs to ask yourself, is there a concrete imminent threat that New York is going to interpret the statute in this strained manner, in such a way that is going to cause an injury in fact to the plaintiff.

In terms of subsection B which covers locations providing behavioral health -- health, behavioral health, chemical dependence care services, again, that finding would essentially mean holding that any church or a pastor who counsels a parishioner at a location providing behavioral health services, I don't think that's supported. And lastly, as discussed in our briefing, history supports the idea that guns can be prohibited to protect vulnerable populations. And again, these are situations where there are going to be many children present.

In terms of public transportation, public transit and airports, I think there are serious problems with plaintiffs' challenge here. We've discussed the idea that the church bus is not public transportation. And similarly, in terms of the airport, you have a situation where one of the plaintiffs says that he will take a trip to Tennessee, hasn't bought a ticket, done some research into flights, he's

going to watch prices, there's no allegations that he has bought a ticket and any state defendant has taken any enforcement action against him. Particularly if he is carrying his weapon in a case as he says that he will, there's no indication that any state defendant is imminently and concretely about to enforce the statute against that. Even if there were -- I apologize, your Honor.

THE COURT: I'm just curious as to the state position, would they be violating the statute if they brought the gun in the manner that they described?

MR. THOMPSON: I think that's an interesting hypothetical that has not been presented. What I would say is I think that airports are absolutely a sensitive place. Public transportation, airports are government property and the government can restrict the possession of weapons in its role as property owner and proprietor.

THE COURT: But again, does your statute prohibit an individual from bringing a weapon to an airport in New York State in compliance with federal law to be transported in baggage; does the statute prohibit that?

MR. THOMPSON: I think it certainly prohibits the carrying of a weapon --

THE COURT: Into an airport.

MR. THOMPSON: -- into an airport.

THE COURT: No matter how it's carried?

MR. THOMPSON: Take a look at section -- it discusses possession in a sensitive location, and so yes, I think it would apply to the carrying of a gun in an airport. And I think that's a reasonable thing that's supported by the fact that airports are unquestionably sensitive.

THE COURT: So as a result of this statute, New Yorkers would not be able to travel with their weapon, concealed carry weapon.

MR. THOMPSON: I think that the statute covers that. I think that, you know, in the question of whether there's -- how that interacts with federal regulations, I don't think it's presented here, I don't think it's been argued to your Honor, but I think that airports are unquestionably sensitive places.

THE COURT: How has it not been argued?

MR. THOMPSON: I don't think that there have been -- that there's been any sort of federal preemption argument made to your Honor.

THE COURT: Oh, I see what you're saying, I thought you meant that they weren't going -- they haven't alleged that they were going to do it.

MR. THOMPSON: No, I think they've alleged that they're going to do it, they've alleged that they are concretely and imminently going to do it. Whether they have alleged that the statute is going to be applied to them in

this manner, whether they've alleged that the state police in particular are going to make an enforcement decision to apply this statute in a manner that would be inconsistent with federal law, I think none of that's in front of your Honor, none of that's supported by the record. But certainly airports are sensitive places and the possession of a gun in an airport is prohibited. And justified I would point out.

THE COURT: So again, according to the statute, there's no way to legally travel with your permitted weapon in New York State as a result of this statute?

MR. THOMPSON: I think that it would be -- I think that the question of how it would be enforced and interpreted is one that law enforcement has the right to make and has the discretion to make and I think that the standing laws recognize that a law can be subjected to a limited construction and that law enforcement has the ability to enforce a statute in a way that is constitutional and that is in compliance with federal law if that comes up.

But what I would say is that the bar on carrying guns in airports is constitutional, it is state property, in many cases, or state entities, and the government may restrict possession of weapons in its role as property owner. These are places where people congregate in confined spaces, they're certainly more sensitive than a fair or a market or a circus or a race course or a ballroom. They're places that

carry out critical public functions. Several federal courts have found that airports are sensitive places. We cite to the *Davis*, I'm going to mispronounce this one, *Huitron-Guizar* case, and *Ferguson* in our briefing.

And I think Fourth Amendment precedent also establishes that these are locations that are sensitive. Your Honor in your October 6th opinion talked about statutes on the journey, allowing people to carry guns on a journey. None of those discussed statutes have analogues to airplanes or public transportation, they talk about people journeying alone.

Moving on to the question of places where alcohol or cannabis are consumed. That's also consistent, an area where history is consistent with common sense. Firearms, drugs, and alcohol do not mix. States have recognized that fact and tried to address it in various ways. We cite to several state laws that prohibit the carrying of weapons by people who are intoxicated as well as other statutes forbidding the sale of weapons to intoxicated persons. Statutes prohibiting people addicted to alcohol from being part --

THE COURT: There's no challenge to this.

MR. THOMPSON: There's not? Then I'll move on. Lastly, places for performance, art, gaming, sporting events, I don't think that plaintiffs seriously dispute this.

Mr. Stamboulieh mentioned that he's not challenging stadiums but that he was challenging some subset of this category. It's still not entirely clear to me what is being challenged. But I think you can look at their reply brief and that makes -- gives it two sentences and the first sentence says that these can't be justified as places where people gather in confined spaces. We think that those certainly can be so justified and that, you know, there are plenty of more or less direct historical analogues that cover recreational spaces, race courses, fairs, ballrooms, social parties, circuses.

And the second sentence that the plaintiffs give to this in their reply brief objects that some of the places might not be sensitive at times when there are not large groups gathered, so maybe the Carrier Dome -- actually it's not the Carrier Dome anymore, is it?

THE COURT: No.

MR. THOMPSON: They changed it. Maybe it's sensitive when Syracuse is playing and it's not at 2 in the morning afterwards. That's an issue for an as-applied challenge. I think unquestionably these places when people are gathered are sensitive, and these -- the statute is facially constitutional. Times Square, they say that they aren't challenging it so I won't get too deep into that.

Similarly, I'll try to go quickly so that I don't

belabor things any more than I already have by going quickly through the First Amendment points raised. The free association argument, free association has two -- has two different aspects to it, intimate association and express association. The CCIA has not violated either of them, has not interfered with anyone's right or ability to intimate association with a particular individual. There's no allegation that it burdens or targets any group that comes together for the purpose of expressive activity. No plaintiff has alleged any harm that would give rise to a violation under either of these theories, and even if they had, any burden to associational interests is minimal and the interests involved in protecting the public from gun violence is significant, with a cite to the *Chi Iota* case, 502 F.3d 136.

In terms of the chilling effect, allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm. For that we cite *Laird*, *Davis*, *Clapper v. Amnesty International*. Here again, there's a lot of allegations about how a licensing officer could do this or that in some hypothetical but no allegation that any licensing officer has actually done so or will do so; and in particular when no application has been submitted, where the only licensing officer is Judge Doran who has never had an application in front of him. And so in many other -- as in

many other ways here, this argument is a solution in search of a problem.

If a licensing officer were to abuse his or her position in the way hypothesized, that would be grounds for an as-applied challenge. And even if plaintiff Sloane did have a genuine injury in fact traceable to any state defendant, which there is not here, the interview, character reference and social media disclosure provisions would satisfy intermediate scrutiny which is the governing test in the First Amendment space. At one point plaintiffs' reply brief says, you know, all this, all these First Amendment arguments sound like the interests balancing found not applicable in *Bruen* but intermediate scrutiny very much is still the governing standard in the First Amendment space. We'd also just point out that the First Amendment is not violated when a law requires disclosure in connection with the essential operations of the government, and for that we cited your Honor's case in *Medina v. Cuomo*.

In terms of the application of the intermediate scrutiny standard here, I'll again try to go through very quickly. These regulations are content neutral, they advance support interests, they do not burden more substantially, more speech than necessary. "A regulation that serves purposes unrelated to the content of expression is deemed neutral even if it has incidental effect on some speakers or

messages but not others." That's a quote from *Ward v. Rock Against Racism*, 491 U.S. at 791. And a law need not be the least restrictive means of furthering the public interest; instead, the narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. That's also from *Ward*, there at 798-99.

The public interest here in preventing gun violence is substantial. The CCIA provisions do not burden any speech, they don't prevent anyone from speaking any message, whether verbally or on social media, and the provisions are narrowly tailored, in particular the social media disclosure provision. All that's required is a list of accounts. There's no requirement to access any nonpublic postings or data, and the CCIA expressly cabins what they can be used for to the question of whether the applicant will use a weapon only in a manner that does not endanger himself or others.

Similarly, there is no compelled speech here. The private property protection does not compel anyone to speak, no one is required to speak at all and even if they do speak, the statute does not dictate what choice the property owner should make or how she should express it. It certainly does not force individuals to express a government-chosen message with which they disagree. In order for there to be a compelled speech issue, the government must force individuals

to either speak a particular message or compel affirmants with a belief with which the speaker disagrees. And I have not written down what case I'm quoting from, but it's one of the cases. Private property --

THE COURT: I'm sure it's in your papers.

MR. THOMPSON: It is in my papers, your Honor. The private property protection does neither of those things.

In terms of the Fifth Amendment, no plaintiff has standing to bring a Fifth Amendment claim. No licensing application has been submitted, no interview has occurred, no plaintiff has declined to answer any specific question, no adverse determination has been reached certainly in a criminal context. To claim the privilege, the hazards of incrimination must be substantial and real, not merely trifling or imaginary. That's from the *U.S. v. Zappola* case. And even if there were an actual Fifth Amendment case or controversy here, there's no compelled incriminating testimony, no one is required to testify, there's no provision where anyone would suffer any criminal consequences for failure to do so. Even if there were an adverse inference taken against a plaintiff in an administrative context which, to be clear, has not happened, is not provided for in the statute, we are well into the realm of hypotheticals, but state officials, this is a quote, "State officials are permitted to take adverse administrative action

for failure to respond to inquiries even where the answers might tend to incriminate, so long as the adverse consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right." That's the *Johnson v. Baker* case, 108 F.3d at 11.

Lastly, on irreparable harm, again, to show irreparable harm the plaintiffs must show that they personally will suffer an imminent violation of their constitutional rights. One that is imminent and concrete, not speculative or hypothetical. That just hasn't been shown, nor has it happened in the multiple months that this case has been pending. On the balance of equities, the harm to the plaintiffs is and remains entirely speculative, while the harm to public safety from injunction would be real. As your Honor noted in *Antonyuk I*, there is an associational relationship between some lenient right-to-carry laws and violent crime. Here in New York, we are lucky to live in a state with the fifth lowest rate of death by firearm according to the CDC. Gun laws play an important role in keeping the public safe and they should not be enjoined, particularly based on the insubstantial and hypothetical harms alleged here.

Lastly, as we asked under the TRO context, in the event that the court were to grant an injunction, we would request that its scope be limited to the specific plaintiffs

and that its effective date be stayed for three business days to allow for potential appeal.

Unless your Honor has any further questions, we would say that this statute is historically justified, passes the *Bruen* test, and that the motion for preliminary injunction should be denied.

THE COURT: Thank you, sir.

MR. THOMPSON: Thank you, Judge.

THE COURT: We've been going since a little after 10:00. I'm going to give everybody a five-minute bathroom break. Stand up, stretch, go to the bathroom, come back, we'll hear from the city, and then if the county defendants want to say anything at all, I'll give you an opportunity. But I think it appropriate that we give everybody a quick break. Okay. No more than five minutes. Please.

(Court in recess, 12:24 p.m. to 12:32 p.m.)

THE COURT: Okay. We're back in session. It's good to see the city here.

MR. LONG: Thank you, your Honor, good to be here.

THE COURT: Welcome to the court.

MR. LONG: Thank you. Good afternoon, your Honor. I'm Todd Long, I'm representing Deputy -- or Chief Cecile in his official capacity here. I know there have been voluminous filings and I know that you've been fully briefed on our position with respect to the preliminary injunction

and I know there's already been a lot of oral argument today so I'm just going to highlight a few specific points with respect to the preliminary injunction motion made by plaintiff Corey Johnson as to defendant Chief Cecile as that seems to be the only nexus to Chief Cecile himself in his official capacity.

Fundamentally, the issue here with respect to preliminary injunction is if the burden has been met by the plaintiff with respect to irreparable harm and/or the likelihood of success. Specifically with respect to the likelihood of success, I would focus on the issue of standing. As to what we're relying upon here as establishing standing and irreparable harm, the only thing on the record that I would say is before the court is not just the -- not the allegations in the complaint but the declaration from plaintiff Johnson itself. And with respect to that declaration, I just want to highlight some issues, just three important points.

Number one, it's in plaintiff Johnson's reply papers that it's first raised that he's a resident of the city of Syracuse. Even if that was something that would then become a part of the record as a fact, in reply, I would offer that it shouldn't determine or change the court's opinion as to whether or not there is irreparable harm according to the preliminary injunction standard. And the

reason I say that is because the only nexus that's made to the city of Syracuse as a jurisdiction with respect to locations where under CCIA he would not be allowed to carry a firearm are vague. The very notion that within the entire county of Onondaga, that that plaintiff intends to go to gas stations, big box stores, grocery stores, et cetera, there's no identification of a specific location within the city of Syracuse where he has been denied access or would be denied access. And even then if he would be denied access, it would not be enough. It would still be well within the realm of speculation.

The only location that is within the city of Syracuse that has specifically been identified is the Rosamond Gifford Zoo which resides nestled with Burnet Park within the city of Syracuse. I believe it's clear from the record that the Rosamond Gifford Zoo is not a city-of-Syracuse-operated park but is a county-operated park. And so the reason I state that and the reason why that is a part of our opposition motion is not to state that the city of Syracuse itself and the Syracuse Police Department just lacks complete jurisdiction over a county facility within the city of Syracuse, but rather as to highlight the speculative nature that the city of Syracuse Police Department would be involved, if at all, in any CCIA-related allegation of violation at the zoo.

As we note in our papers, specifically that, first off, the county park system has its own county park ranger system and, having myself even gone to the zoo, have seen armed county park rangers myself there. So in the event that there is a chasm essentially that plaintiff would have to cross to say, I'm going to the zoo within the next 90 days, to say Chief Cecile is going to direct his police department to arrest me at the zoo and take my gun. That's a series of events that have not yet occurred and have not even been alleged in plaintiff's papers or his declaration in the realm of speculation. So it would have to be that it was identified that there was a firearm, that there was a complaint made, because the only allegation that Chief Cecile would ever be involved in the potential arrest of an individual as a violation of CCIA would be complaint driven. There would be no proactive policing to that effect. So then there would have to be a complaint, and that complaint would have to be made and identify the Syracuse Police Department as the responding party. Well, given the fact that there's a complete other police force that polices these parks, it could very well also be a park ranger that would respond and address the issue. So clearly then does not establish --

THE COURT: But there's nothing indicating that it wouldn't be the Syracuse Police Department?

MR. LONG: Correct, there's nothing indicating that

it wouldn't.

THE COURT: So in fact the -- you tell me because I'm not certain and the court is curious, Burnet Park Zoo sits within the city park, Burnet Park?

MR. LONG: It does sit within the park, correct.

THE COURT: So there's no way to get to the zoo other than going into a city park?

MR. LONG: I would have to reference the map, but you may have to traverse through the park to get into the zoo, correct. But that's working under the assumption that there would be somebody checking at the park for somebody to have a firearm.

THE COURT: So if there's a complaint of a person with a weapon in the parking area of the Burnet Park Zoo, they would indeed be on city property?

MR. LONG: I do not believe the parking lot is within city property.

THE COURT: You think that's county.

MR. LONG: I believe that it's county.

THE COURT: How about traveling to the zoo?

MR. LONG: Traveling to the zoo through Burnet Park?

THE COURT: Yes.

MR. LONG: If traveling through the zoo at Burnet Park -- excuse me, through Burnet Park into the zoo, on a

city park, there could be a situation complaint driven, but again, we have to get to the point where there was a complaint made and there is still that chasm, no identification of who would make that complaint, under the circumstances such a complaint would be made. And so we're still within this realm of speculation. Dipping a little further into that pool of speculation would be that even traveling through the park itself, if that would result in, you know, if that complaint would then result in a Syracuse police response.

THE COURT: And with regard to the affiant's indication that he intends to frequent restaurants, stores within the city of Syracuse?

MR. LONG: Correct me if I'm wrong, your Honor, but I do not believe the affiant at any point identifies a specific store or restaurant within the city of Syracuse, it's generally within the County of Onondaga which the city of Syracuse is subsumed within the much larger county. We represent probably one-third of the entire population of the county and probably less than that in land mass. So it's, again, with respect to the analysis under preliminary injunction as to irreparable harm, vague, vague countenances of locations that I will go are too vague to articulate an actual irreparable harm and the burden is on, again, 50 percent plus likelihood.

And I would just add then further to that how we, or one would identify what the zoo is as a location. It's not clear that it's specifically just a zoo. As we offered in our papers, it's clear that the zoo operates with Cornell as an educational veterinary training facility for students of Cornell's veterinary school. Also upon information and belief, the employees that administer all of the programs at the zoo, their officers are co-located on the property. So understanding that it's not just a zoo but it's an educational facility that in your Honor's October 6th decision understood educational facilities, particularly even of universities, would be areas that gun carrying could be restricted.

I would say that for the sake of this preliminary injunction that there is not a likelihood of success on the merits based on the record that's been presented as material fact that the zoo is also not an educational facility. And for the rest, we rest on our papers, your Honor.

THE COURT: Thank you, sir.

MR. LONG: Thank you, your Honor.

THE COURT: Appreciate you being here.

MR. LONG: Thank you.

THE COURT: Onondaga County, Mr. Heisler?

MR. HEISLER: Nothing, thank you, your Honor.

THE COURT: Thank you, sir, thank you for being

here. Mr. Melvin.

MR. MELVIN: Nothing to add, your Honor.

THE COURT: Okay, thank you. I'll leave it to counsel, would you like the opportunity for a brief reply?

MR. STAMBOULIEH: Brief reply, your Honor, yes.

THE COURT: I'm going to keep them briefer, we've been going extensively, so I think we'll limit it a little bit, I can see everybody I think is in agreement with that. Okay. So I would say, you know, things that you think are critical to your argument.

MR. STAMBOULIEH: Yes.

THE COURT: Let's focus on them and keep it short and sweet.

MR. STAMBOULIEH: May I proceed, your Honor?

THE COURT: You may, sir.

MR. STAMBOULIEH: I'd like to address Mr. Long's argument about Chief Cecile. If we go to the declaration of Johnson on paragraph 23, he talks about DA Fitzpatrick who's the DA of Onondaga County and Chief Cecile and he says the top law enforcement officials where I live. He doesn't specifically say I live in Syracuse but he does say, talks about these individual people who are the top law enforcement officials where he lives. So to the extent that they don't believe that he announced it until his reply papers, I think it was plain from his -- the face of his declaration.

There's a couple things I want to touch on from my friend the state's argument. The application for Sloane is 100 percent futile, if we look at the admission in -- I have this open here, from Sheriff Conway, and we go down to paragraph 13, you know, they filed answers in this case, they're not opposing the relief that is being sought here, but their answer specifically says and it's -- I hope I didn't put in the wrong page, give me one second, Judge, I'm sorry. It's Docket Number 35, paragraph 5, I apologize. Defendants admit to allegations of paragraph number 13, that the sheriff is responsible for maintaining the pistol files, that Conway requires an applicant for a license to schedule an appointment, and that it's, to proceed, all four character references forms must be completed and signed and applicants must have attended and they can't schedule an appointment until the application prerequisites have been met, and all of the things that we alleged in the complaint, Judge, they're admitting that the application is not going to be processed, it's going to be returned. I don't know how much more futile we can get from this other than to actually apply, wait until -- actually Sloane's appointment is in November of 2023 now, so November 6th I believe is what the appointment is, so we would have to wait for November 6th to come around before he goes to see Sheriff Conway for Sheriff Conway to say, I'm sorry, I'm not going to approve or send to Judge Doran this

incomplete application.

THE COURT: So it's your position that the law does not allow a constitutional right to be frustrated in that manner?

MR. STAMBOULIEH: A hundred percent.

THE COURT: Not to be delayed, shouldn't have to wait until November 6, 2023 to bring this challenge because he intends and has applied.

MR. STAMBOULIEH: Judge, I have the application with me, if Sheriff Conway would take the application without Mr. Sloane having to trade his constitutional rights which, as the Supreme Court has said, you shouldn't have to surrender one right to exercise another, I've got the application, it's right here on the table, I could hand it to his attorney and give it to the sheriff, but he's not going to do it because he can't, because the law makes plaintiff Sloane trade one right for another which the Supreme Court has said is -- I don't even remember the right word but they don't like it, how about that?

So the standard as Mr. Thompson said is that for a facial challenge, it has to be constitutional in all its applications but he left out the qualifier, or lack a plainly legitimate sweep. And one of the problems with the Concealed Carry Improvement Act, and I'm -- I hate to belabor it, Judge, is that it lacks the plainly legitimate sweep because

it only deals with law-abiding gun owners. There's no new technological change, no new societal problem with law-abiding gun owners carrying their firearms in places in New York that they've always been allowed to carry. And so the CCIA on its face lacks the plainly legitimate sweep because all of the places that they couldn't have carried in prior to this, if the 265.01-e goes away, they're still not going to be allowed to carry in schools because a separate part of the code blocks them from doing that.

And the *Sibley v. Watches* about the good moral character, the Second Circuit, if *Libertarian Party* still controls good moral character, there's no need to remand it to see how *Bruen* changes good moral character. And I understand what they say in the order and that it's just a remand order, I got one too in *Young*, it's okay, but it just seems like it would be odd that there would be a necessity to remand it if *Libertarian Party* was still controlling and so ...

My last thing that I'm -- well, two last things. Airports, I think Mr. Thompson has made clear, airports are off limits and there's nothing -- you can't even travel, there's no safe harbor under 18 U.S.C. 926(a) and all of this is in our reply brief. It appears that he touched on all of the things in his opposition which we have already addressed in our reply.

I do 100 percent disagree with vulnerable people as being outside of the people that the Second Amendment applies to. I'll give your Honor one citation, it's the *Jamie Caetano* case about the stun gun at the Supreme Court from 2016 where she -- one of the vulnerable people, a domestic violence surviver and a victim had a stun gun that she used to keep her abusive ex-boyfriend away from her. So I don't believe that vulnerable people, just because their status is victims, if we're talking vulnerable people as someone that's mentally deficient, mentally retarded, someone who's been mentally ill, it's different than saying all vulnerable people who could be classified as victim of domestic violence, domestic assault, things like that. I don't believe those people are outside of the Second Amendment.

I will respond to one other thing. Please, if your Honor is inclined to grant the temporary re -- I'm sorry, preliminary injunction, don't stay it. The Second Circuit has not moved with alacrity in addressing the motion by the state and the state has asked for their brief to be due on December 7th. Chief Cecile, who also appealed it, has asked for his brief to be due in January. The TRO, while I enjoyed reading it, has not provided any actual relief to the plaintiffs because, because it's been stayed.

And as to the last point with applying just to the plaintiffs, Judge Sinatra from the Western District --

THE COURT: Counsel, I just want to touch on that. It seems completely feasible to the court that the Second Circuit is aware of the fact that this motion is pending and that there will be a decision forthcoming, so what you're saying is that the briefing on the temporary restraining order are December and January?

MR. STAMBOULIEH: That is what the appellants have requested, yes, sir.

THE COURT: Okay. But it has not been set?

MR. STAMBOULIEH: It has not been set, that is what has been requested and there's been nothing further from them. Sorry. I literally just had it and I lost it but it's the last footnote on, in Judge Sinatra's opinion where he says, when the state asks him to apply this temporary restraining order simply for the plaintiff in front of him, he said no, if the exception applies -- if it's unconstitutional, basically has to apply everywhere and we would ask for the same thing. Thank you, Judge.

THE COURT: Thank you, sir. Mr. Thompson.

MR. THOMPSON: Thank you very much, your Honor. Just a couple of very quick points responding to what Mr. Stamboulieh had to say.

In terms of futility and any delay that's coming from Sheriff Conway, again, that might support a Second Amendment claim against Sheriff Conway because of the delay

being a bar to the right to bear arms, but it doesn't create standing against state defendants and there's no futility stemming from the actions of the state defendants.

Similarly to the allegation that CCIA applies only to law-abiding gun owners, that's not the case. The licensing requirements are in fact designed to make sure that people applying for gun licenses are in fact law-abiding responsible citizens. That's something that's contemplated in *Bruen* specifically. And the laws on sensitive places, the laws on private property apply to everyone, including people without a license as well. It is illegal for anyone without a license also to carry a gun into a school or into a zoo.

Sibley, I think Mr. Stamboulieh is correct that it is just a remand order, and *Sibley* specifically says that it has no precedential effect as to anything else, doesn't mention *Libertarian Party*, certainly there's no basis to view it as overruling really a foundational case.

And so with that, your Honor, outside of that, I will rest on our papers and thank you very much for hearing us today.

THE COURT: Thank you, sir. Okay. If there's nothing further from the city?

MR. LONG: No, your Honor.

THE COURT: Okay. Counties' good, both counties?

MR. HEISLER: Yes, your Honor.

THE COURT: Okay, thank you. All right, then that will conclude our hearing today, a decision will be forthcoming, and we'll go from there. I don't know if I'll see you again, but thank you for your advocacy and your arguments and we'll get a decision out as quickly as possible. Thank you.

THE CLERK: Court's adjourned.

(Court Adjourned, 12:51 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 26th day of October, 2022.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter